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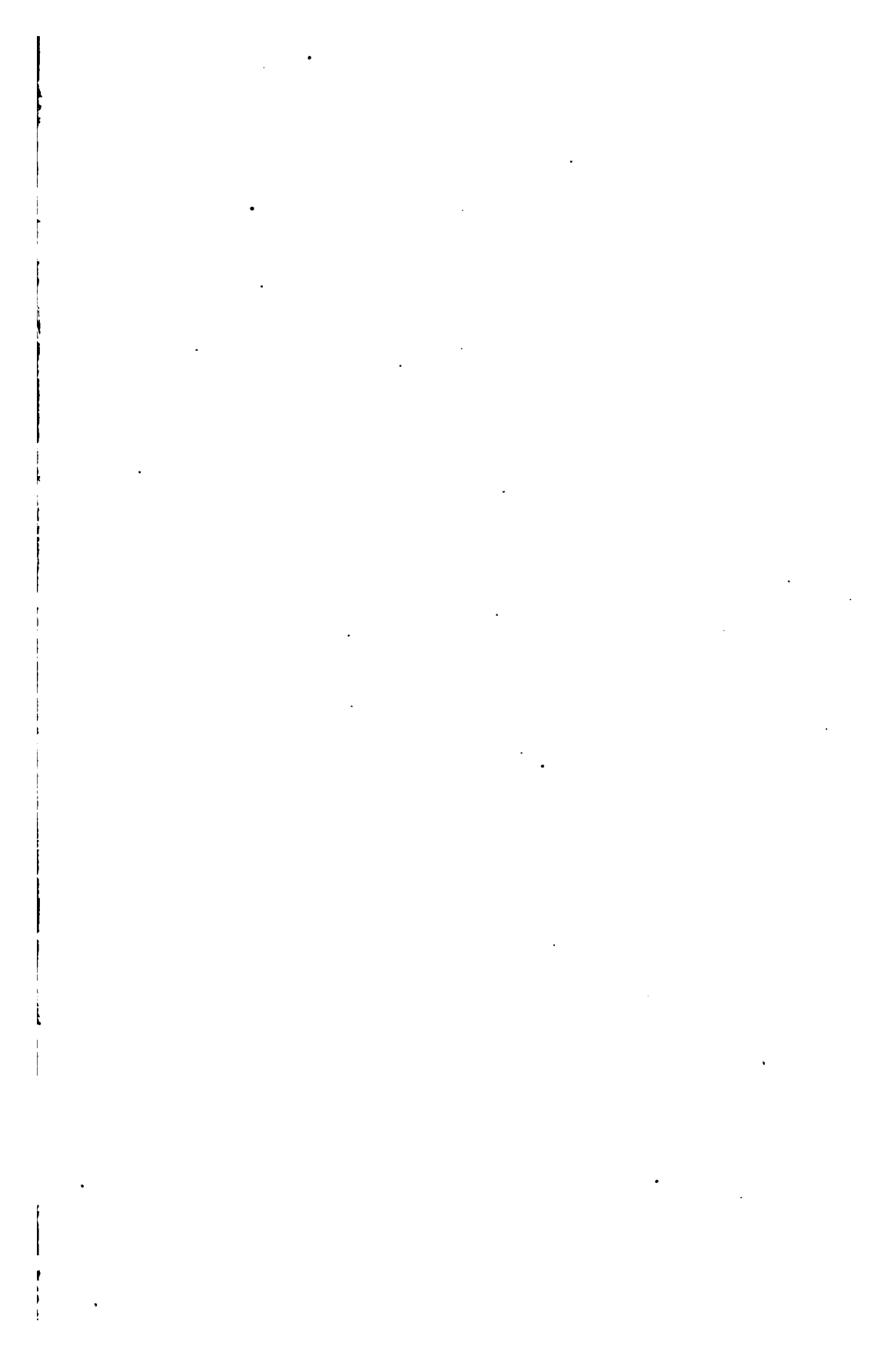


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*U.S. Courts*

# FEDERAL ANTI-TRUST DECISIONS

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CASES DECIDED IN UNITED STATES COURTS

ARISING UNDER, INVOLVING, OR GROWING  
OUT OF THE ENFORCEMENT OF

THE ANTI-TRUST ACT OF JULY 2, 1890  
(26 STAT., 209)

INCLUDING A FEW SOMEWHAT SIMILAR DECISIONS  
NOT BASED UPON THAT ACT

1890-1912

COMPILED BY

JOHN L. LOTT

UNDER THE DIRECTION OF THE ATTORNEY GENERAL

IN FOUR VOLUMES

VOL. 3

INDEX AND TABLES IN VOLUME 4

WASHINGTON  
GOVERNMENT PRINTING OFFICE  
1912

SENATE OF THE UNITED STATES,

*May 17, 1911.*

*Resolved by the Senate (the House of Representatives concurring),* That there be printed and bound three thousand copies of the Federal Anti-Trust Decisions, eighteen hundred and ninety to nineteen hundred and eleven, to be compiled by the direction of the Department of Justice, one thousand copies for the use of the Senate and two thousand copies for the use of the House of Representatives.

Attest:

CHARLES G. BENNETT, *Secretary,*  
By HENRY H. GILFRY, *Chief Clerk.*

Attest:

SOUTH TRIMBLE, *Clerk.*

G. H.  
Dept of Justice  
6/20/30

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# FEDERAL ANTI-TRUST DECISIONS

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VOL. 3.

1906—1910.

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## [161] LEONARD *v.* ABNER-DRURY BREWING COMPANY.\*

(Court of Appeals, District of Columbia.)

[25 Appeal (D. C.) Cases, 161.]

TRUSTS AND MONOPOLIES; UNJUST COMPETITION; RESTRAINT OF TRADE;  
ANTI-TRUST ACT; CONSPIRACY; EQUITY JURISDICTION; COSTS ON  
APPEAL.

1. A combination between several brewing companies forming a brewers' association, entered into for the purpose of preventing competition in the manufacture and sale of their product, fixing the price, and controlling the disposition of the same to retail dealers, providing that its members shall not sell such product at prices fixed by themselves nor below prices fixed by the association, and allotting the business of selling the same among them, and prohibiting any one of them from selling to customers allotted to another,—is a trust or conspiracy in restraint of trade within the 3d section of the anti-trust act of Congress (26 Stat. at L. 209, 647, U. S. Comp. Stat. 1901, p. 3201); and an attempt to coerce another company to enter the trust and obey its regulations is an invasion of private right, as well as inimical to the interests

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\* *Illegal Trusts and Monopolies.*—For the authorities bearing on the question of illegal trusts under modern anti-trust laws both state and Federal, see editorial note to *Whitwell v. Continental Tobacco Co.* 64 L. R. A. 689.

## Syllabus.

of the public; and the purposes and practices of such a combination or conspiracy are equally violative of the common law, which prevails in this District, and of which the 3d section of the statute is declaratory.\*

2. Such an agreement or combination can not be declared null and void in [162] equity at the suit of retail dealers engaged in purchasing and selling the product of a company sought to be compelled to join such association, but having no contract with it for the purchase of such product. Such a result can only be accomplished at the suit of the United States.
3. But where such retail dealers show that they have established a profitable business in selling the product of the company so sought to be coerced, which is unwilling to advance the price of the product, but wishes to continue to sell to them at the lower price, but, intimidated by the threats of the association, such company is about to yield to its demands, and will do so unless restrained, in which event there will be an advance in prices, and such dealers may thereupon be allotted as customers to some other member of the trust against their will, and be unable to purchase the product they have been dealing in even at the advanced price, and their business will be so destroyed,—an injunction will lie at their suit to prevent the doing or continuing of the wrongful acts, the remedy at law, if any, even under the statute giving three fold damages, being inadequate, and consequential damages, such as loss of trade and profits and failure of credit and business, not being ordinarily recoverable at law.
4. The fact that the anti-trust act of Congress makes a conspiracy in restraint of trade a crime, and provides a penalty therefor, does not necessarily impair the ordinary jurisdiction of equity, where the criminal acts work irreparable injury to property. The statute does not substitute its remedy for others which existed before its enactment.
5. *Quære*.—Whether if the wrongs complained of by an individual, growing out of alleged acts in restraint of trade in the District of Columbia, as distinguished from acts relating to conspiracies in restraint of interstate commerce, should be remediless save by a resort to the anti-trust act of Congress, any party other than the United States can invoke the jurisdiction of equity to restrain their commission.
6. Where several brewing companies forming a combination or trust are charged by complainants in a bill in equity, retail dealers in malt liquors, with a conspiracy to compel another company to join the association, and such combination is held to be in restraint of trade, individuals who are officers of a labor union, and who are charged with attempting to procure its members to leave

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\* Syllabus, and statements of arguments copyrighted, 1906, by Charles Cowles Tucker.

## Statement of the Case.

the employment of such company unless it will agree to enter such association, are equally within the scope of the remedy by injunction sought to prevent injury to the complainants through the execution of the objects of the conspiracy entered into by their codefendants.

7. Where some of a large number of defendants to a bill in equity demurred to the bill, and from a decree dismissing it the complainant appealed, and other of the defendants entered their appearance in this court [168] and were heard in support of the decree, this court, in reversing the decree, awarded costs against all of the defendants appearing in this court.

No. 1474. Submitted February 21, 1905. Decided March 7, 1905.

HEARING on an appeal by the complainants from a decree of the Supreme Court of the District of Columbia dismissing a bill in equity for an injunction. *Reversed.*

The COURT in the opinion stated the case as follows:

This is an appeal from a decree sustaining a demurrer to and dismissing a bill for injunction. The bill was filed July 21, 1904, by James C. Leonard and Samuel G. Stewart, retail liquor dealers in the District of Columbia, on their own behalf and on behalf of others similarly engaged who may wish to intervene. The defendants are the Abner-Drury Company, a corporation organized under the laws of West Virginia; the National Capital Brewing Company, a corporation of Virginia; the Arlington Brewing Company, a corporation of Virginia; the Washington Brewery Company, a corporation of New York; the Chr. Heurich Brewing Company, a corporation of Virginia; the managers of said corporations, respectively, and Louis S. Crown, Michael Cockery, and Timothy Healy. It is averred that all of said corporations, save the Arlington company, have their breweries and general offices in District of Columbia; that the Arlington company brews its beer in the State of Virginia, but maintains an office and agency for the sale and distribution of its product in the District of Columbia. Defendants Crown and Cockery, residents of the District, are charged as members and officers of an unincorporated association known as Local No. 68 of the International Brotherhood of Stationary Firemen; and Healy, a non-resident, as president of said International Brotherhood.

## Statement of the Case.

It is averred that the five brewing companies are engaged in manufacturing or brewing malt liquors, and dispose of the bulk of their product, which amounts annually to about two hundred [164] and seventy thousand barrels, in the District of Columbia; and that the retail dealers thereof are dependent upon them for the bulk of their stock in trade; that the said brewing companies, excepting the Heurich company, have confederated and conspired together in a brewers' association, or under a name of similar import, in order to prevent competition in the manufacture and sale of brewed or malt liquors, to control the disposition of the same to the retail liquor dealers, and to prevent competition in the price of the same; that by the terms of the confederation and agreement aforesaid no one of said brewing companies shall sell its product at a price to be fixed by itself, nor below an arbitrary price to be fixed by the associators; and, further, the business of selling beer is to be allotted among them, and no one is to sell to the customers allotted to another; that for more than a year a certain grade of "light" beer has been sold to retail dealers at \$4 per barrel, with a discount of 10 per cent for cash, making \$3.60 per barrel; that prior to said time the price for said beer had been \$6, with a discount of 5 per cent for cash, making \$5.70 per barrel; that the reduction had been caused by the Heurich company, which had never entered into any agreement with other brewers, and has until this date refused to do so, and that by reason of the reduction in price by the Heurich company the other companies were compelled to reduce the price of their beer to the same figure in order to meet the competition of the Heurich company; that in order to raise the price of beer to that of \$6 per barrel the four companies aforesaid entered into a conspiracy to suppress the competition of the Heurich company, and to effectuate the same conspired together to compel the Heurich company to join the association aforesaid, and to abide by and observe the prices fixed thereby, as well as the distribution or allotment to be made among consumers and customers; that the Heurich company in the manufacture of beer is compelled to employ firemen who are members of said Local No. 63 of the International Brother-

## Statement of the Case.

hood of Stationary Firemen; that in order to aid in the accomplishment of the purposes of the conspiracy the said four companies agreed with Crown and Healy to induce the firemen employed by the [165] Heurich company to break their contract of employment, unless the latter would agree to enter said association, submit to its regulations raising the price of beer and allotting a division of customers; that in pursuit of the objects of the said conspiracy the said defendants composing the Brewers' Association procured the said defendant Crown to address a communication to the Heurich company notifying it that its contract with its firemen would be terminated on July 1, and that the firemen would not be permitted to work for it unless it joined the said association and submitted to its rules and exactions; that further, to effect the object aforesaid, said defendants composing said association caused the defendant Healy, in his character as president of the brotherhood aforesaid, to seek a conference with the defendant Heurich company, ostensibly to adjust a contract between said defendant and its firemen for the ensuing year, but in reality to compel said defendant to agree to enter said association and submit to its rules and regulations. Further allegations of the bill are quoted as follows:

"That at the said conference said Healy in the presence of the defendant Edward F. Abner, representing the Abner-Drury Brewing Company and acting for it in that behalf, and of Albert Carry, representing the defendant the National Capital Brewing Company and acting for it in that behalf, and of the defendant Bernard Katz, representing the Arlington Brewing Company, and acting for it in that behalf, informed the representative of the defendant, the Chr. Heurich Brewing Company, that unless the last-named defendant should agree to confer with the representatives of the other four brewing companies representing the Brewers' Association aforesaid, and join said association and submit to its rules and exactions, particularly its requirement that the said Chr. Heurich Brewing Company should raise the price of its light beer to its customers to \$6 per barrel, and sell only to such customers as the said association might allot

## Statement of the Case.

to it, he, the said Healy, in his character as president of the International Brotherhood of Stationary Firemen, would not confer with said Chr. Heurich Brewing Company in respect to a contract between it and the said Local No. 63 of [166] the International Brotherhood of Stationary Firemen, nor permit its members to enter into the employment of said Chr. Heurich Brewing Company to serve the said defendant in the prosecution of its business. The said Healy then and there in the presence of the defendant Edward F. Abner, representing the Abner-Drury Brewing Company and acting for it in that behalf, and of Albert Carry, representing the defendant, the National Capital Brewing Company, and acting for it in that behalf, and of the defendant Bernard Katz, representing the Arlington Brewing Company, and acting for it in that behalf, further informed the representative of the defendant the Chr. Heurich Brewing Company that the said meeting was called for the purpose of compelling the defendant the Chr. Heurich Brewing Company to join said association composed of the other four defendant brewing corporations, and to raise the price of light beer to the retail liquor dealers to \$6 per barrel, and to sell its beer only to such of the retail liquor dealers in the District as the association might authorize it to sell the same; and that, in the event of the said defendant the Chr. Heurich Brewing Company refusing to submit to its demand, other workmen in the employ of said defendant the Chr. [Heurich] Brewing Company would be required to quit work, and that the product of said brewery would, through the influence of said Healy, be boycotted, meaning and intending thereby that he, the said Healy, had the power and means and would use the same to interfere with and prevent the sale of the product of said Chr. Heurich Brewing company to these complainants and other retail liquor dealers and to general consumers of beer within the District, unless the said defendant complied with the said demands.

"11. The complainants further show that they are and have for some years past been engaged in the purchase and sale of the product of the defendant the Chr. Heurich Brewing Company, and have a large demand for the same in their business; that if the said defendant the Chr. Heurich



## Statement of the Case.

Brewing Company shall yield to the demands of the other defendants, and increase the price of the beer to \$6 per barrel, the said increase of price will involve great loss and irreparable injury to these com[167]plainants and other retail liquor dealers similarly situated, and that, if the demands of said Healy and the said four defendant corporations composing said Brewers' Association are complied with by the defendant the Chr. Heurich Brewing Company, these complainants and other retail liquor dealers will be prevented from purchasing and selling the product of the defendant the Chr. Heurich Brewing Company to their irreparable loss and injury, and the deprivation of their customers, who are accustomed to purchase the said product from these complainants and others selling the same.

" 12. Your complainants are further informed and believe and therefore charge that no disagreement or controversy has arisen between the defendant the Chr. Heurich Brewing Company and any of its employees; that no change in the services, hours of labor, or wages of the firemen employed by it is sought or desired by said firemen, and that the purpose of the defendant Healy and the defendant Crown in advising and commanding the said firemen to cease their employment with the said defendant the Chr. Heurich Brewing Company, as hereinafter set forth, is to embarrass said last-named defendant in its business, and compel it to abandon its competition in trade and its sale of its product at the price now charged by it to all consumers, and to compel it to increase the price to the sum of \$6 per barrel, and to limit the sale thereof to certain specified purchasers, instead of extending the same to these complainants and all other retail liquor dealers.

" 13. Your complainants are further advised and therefore charge that the purpose and object of the conspiracy entered into among the said defendants the Abner-Drury Brewing Company, the National Capital Brewing Company, the Arlington Brewing Company, the Washington Brewery Company, and the said Crown and Healy, by causing a strike or refusal to work among the employees of the defendant the Chr. Heurich Brewing Company, is to stifle competition in

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the brewing business, and to restrain the conduct of trade in violation of the rights of these complainants and of other retail liquor dealers and of the general public, and in violation of the law of the [168] land. And they are further advised and believe and therefore charge that the said design and purpose of the said defendants is contrary to public policy and good morals, and such as a court of equity can and ought to restrain by injunction against said defendants.

"14. Your complainants are informed and believe and therefore charge that the said defendant Healy, in furtherance of the conspiracy entered into by him and the defendant Crown and the four defendant brewing corporations composing the Brewers' Association aforesaid, has actually ordered the firemen employed by the defendant the Chr. Heurich Brewing Company to quit the service of said defendant, and to refuse further to perform their contract of employment with it at 12 o'clock noon on the 21st day of July, 1904, unless said defendant the Chr. Heurich Brewing Company shall submit to the demands of said conspirators, and enter into said Brewers' Association, and abide by and be governed by its rules and exactions, and agree to raise the price of light beer to \$6 per barrel, and to sell the same only to such persons as the said association shall prescribe.

"15. Your complainants are further informed and believe that the said defendant the Chr. Heurich Brewing Company is considering the said threats and demands of the said defendants, and may by reason of the threatened injury to its business yield to the demands of said defendant and enter said association, and as a consequence thereof increase the price of its beer to \$6 per barrel, and submit to the restrictions of the said association as to the persons to whom the same may be sold.

"16. Your complainants are advised and believe and therefore charge that the said agreement and confederation between the said defendant corporations composing the Brewers' Association is an unlawful agreement in restraint of trade, designed to prevent competition in business and to restrict the persons to whom the products of breweries may be sold, and that the said defendants cannot lawfully main-

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tain said association or enforce its rules, and that it will be unlawful for the defendant the Chr. Heurich Brewing Company to enter into [169] said agreement and confederation, or to abide by and observe its rules and restrictions."

The prayers of the bill are: 1. That the association agreement be declared null and void. 2. That defendants, their agents, etc., be perpetually enjoined from attempting to coerce the Heurich company into joining said association or entering into the terms of said agreement. 3. That the defendants composing the association, their agents, etc., be perpetually enjoined from inviting, soliciting, or demanding that the Heurich company shall increase the price of its product to complainants, to any other retail dealers, or to any persons whomsoever, or directly or indirectly counseling or advising such action. 4. That the defendants composing the brewing association, their agents, etc., and the defendants Crown and Healy, be perpetually enjoined from commanding, counseling, advising, or by any means inducing the firemen or other employees of the Heurich company to quit the service of the same, or from in any manner attempting to regulate the price at which said company shall sell any of its product, or the person or persons to whom it may sell the same. 5. That the Heurich company be perpetually enjoined from entering into the confederation known as the Brewers' Association, or from entering into any combination or agreement with the defendant companies, or any of them, for the purpose of regulating the price at which the product of any of said corporations shall be sold, or the persons to whom the product of any of said companies shall be sold; or from in any manner attempting to restrict or restrain the competition between the several brewing companies in the prosecution of their business of manufacturing and selling the product of their breweries. The Abner-Drury Brewing Company, and Harry Williams, the representative of the Washington Brewery Company, appeared and filed demurrers to the bill, which were sustained. It does not appear from the record that any of the other defendants entered their appearance. The Abner-Drury Brewing Company and the Arlington Brewing Com-

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pany have, however, appeared by counsel in this court and been heard in support of the decree appealed from.

[170] *Mr. Wm. G. Johnson* and *Mr. J. M. Carlisle*, for the appellants:

1. The combination and conspiracy of the defendants was unlawful. 2 Pom. Eq. Jur. § 934n, p. 1333; *Crawford v. Wick*, 18 Ohio St. 190; *Emery v. Ohio Candle Co.* 47 Ohio St. 320; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *Craft v. McConoughy*, 79 Ill. 346; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558; *Nester v. Brewing Co.* 161 Pa. 473; *North-ern Securities Co. v. United States*, 193 U. S. 197, 339.

2. Not only is the combination alleged in the bill an unlawful one, but the means adopted to carry it into effect were also unlawful. *Thomas v. Cincinnati R. Co.* 62 Fed. 803; *Old Dominion S. S. Co. v. McKenna*, 30 Fed. 48; *Casey v. Cincinnati Union*, 45 Fed. 135; *Emack v. Kane*, 34 Fed. 47; *Angle v. Chicago R. Co.* 151 U. S. 1.

3. Apart from this common-law rule there is express statutory enactment declaring such a combination as is shown by the bill in this case to be illegal. Section 3 of the act of Congress of July 2, 1890, commonly known as the anti-trust act.

4. The complainants are entitled to the relief sought by the bill. *Jackson v. Stanfield*, 137 Ind. 592; *Old Dominion S. S. Co. v. McKenna*, 30 Fed. 48; *Casey v. Cincinnati Union*, 45 Fed. 135; *Emack v. Kane*, 34 Fed. 47; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *Re Debs*, 158 U. S. 564.

*Mr. Charles W. Darr* for the appellees the Abner-Drury Brewing Company and Abner.

*Mr. Arthur A. Birney* and *Mr. Henry F. Woodard*, for the appellees the Washington Brewery Company and Henry Williams:

1. The averments of the bill very clearly set forth an unlawful conspiracy and confederation that would be enjoined in [171] a court of equity at the instance of the United

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States, and it may be that sufficient is shown to justify an injunction upon the application of the Christian Heurich Brewing Company if that company had filed a bill, but not so with the appellants. To entitle complainants to relief they must show special injury. 2 Dan. Ch. Pr. 4th Am. ed. p. 1675; 10 Enc. Pl. & Pr. 900, note 2; *Georgetown v. Canal Co.* 12 Pet. 99; *Re Debs*, 158 U. S. 592, 593; *Smith v. Lockwood*, 13 Barb. 218; *Sparhawk v. Union Pass. R. Co.* 54 Pa. 401.

2. At the common law there was no cause of action by the master for enticing away his apprentice. Later, Parliament passed an act granting a remedy. For many years the law was only applied to cases of enticing away of apprentices. Afterwards the doctrine was extended by the courts to all cases where there were contracts, so that since the case of *Lumley v. Gye*, 2 El. & Bl. 216, if one induce another to break a contract an action for damages will lie. See also *Angle v. Chicago R. Co.* 151 U. S. 13; *Walker v. Cronin*, 107 Mass. 555; *Dale v. Grant*, 34 N. J. 142; *Doremus v. Hennesy*, 43 L. R. A. 802; Cooley, Torts, 2d ed. note 1, par. 70; *Allen v. Flood*, 67 L. J. Q. B. N. S. 119, A. C. 1.

In the case at bar, if the four conspiring defendant companies and the defendant Healy enticed or induced the employees of the Christian Heurich Brewing Company to quit its service and break an existing contract, the company would be entitled to an action for damages, but certainly not a person who expected to purchase goods from the company; if so, why not extend the remedy to persons who expected and had contracted to take the goods from the person who expected to purchase from the company, and so on, *ad infinitum*.

3. From the averments of the bill, particularly those contained in paragraph 16, it would appear that it had been framed under the anti-trust law (Supplement to Revised Statutes, 1874-1891, p. 763). A private bill for an injunction will not lie to enforce its provisions. *Blindell v. Hagan*, 54 Fed. 40; *Pidcock v. Harrington*, 64 Fed. 821, 2 Gold & Tucker's notes on Rev. Stat. 623. The anti-trust act is not confined [172] to combinations of railroad companies in restraint of trade, but extends to all classes of business, the

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direct result of which is in restraint of trade or commerce among the several States. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211.

4. A court of equity has no criminal jurisdiction, and cannot interfere to prevent the commission of criminal or illegal acts, unless there is some interference, actual or threatened, with property or rights of a pecuniary nature; but when there is such interference, and there is no adequate remedy at law, the fact that the act may be criminal will not divest the jurisdiction of equity to prevent it. 16 Am. & Eng. Enc. Law, 2d ed. p. 363, and note 1.

*Mr. Lorenzo A. Bailey*, for the appellee the Arlington Brewing Company:

1. No legal injury to the complainants, past, present, or prospective, is shown by the bill. *Crowley v. Christensen*, 137 U. S. 86; *Giozza v. Tiernan*, 148 U. S. 657, 662; *Bartemeyer v. Iowa*, 18 Wall. 129, 133; *United States ex rel. Roop v. Douglass*, 19 D. C. 99; *Re Hoover*, 30 Fed. 51, 55; *Burke v. Collins* (S. D.) 99 N. W. 1112; *Haggart v. Stehlin* (Ind.) 29 N. E. 1073; *Tragesser v. Gray*, 73 Md. 250, 255, 9 L. R. A. 784; *State ex rel. George v. Aiken*, 42 S. C. 222, 231; 26 L. R. A. 345; *Harrison v. Lockhart*, 25 Ind. 112; *People v. Gallagher*, 4 Mich. 244, 257; *Adler v. Fenton*, 24 How. 407; *Truly v. Wanzer*, 5 How. 141.

2. The combination of the defendants as alleged is not unlawful or contrary to public policy. The policy of the law is not toward the unrestricted or general sale of beer. Therefore an agreement limiting the sale and providing for fixing the prices thereof is not contrary to public policy. *Anheuser-Busch Brewing Asso. v. Houck* (Tex. Civ. App.) 27 S. W. 692; *Vandeweghe v. American Brewing Co.* (Tex. Civ. App.) 61 S. W. 526. Combinations among competitors, the object of which is to realize a fair price for the goods manufactured and sold, do not contravene any rule of public policy, even though [173] they operate in some respects as in restraint of trade. 1 Eddy, Combinations, § 276. A combination to control competition is legal where oppressive monopoly is not intended. *Id.*, §§ 189-209, 270. There is a clear dis-

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tion between acts which have inducement in malice or ill will, and those which have inducement in business competition and rivalry. The latter are legal combinations, and the former are not. 8 Cyc. 650; *Doremus v. Hennessy*, 176 Ill. 608, 43 L. R. A. 802; *Mogul S. S. Co. v. McGregor*, L. R. 21 Q. B. Div. 544; *Cohen v. Berlin & J. Envelope Co.* 56 N. Y. Supp. 588; 2 Eddy, Combinations, § 1046. The alleged purpose of the association to allot customers, etc., is not unlawful. The brewers have a right to select the persons with whom they will do business. It is so held in cases for injunctions against trade combinations. *Continental Ins. Co. v. Fire Underwriters*, 67 Fed. 310; *Tanenbaum v. New York F. Ins. Exchange*, 33 Misc. 134; 68 N. Y. Supp. 342; 8 Cyc. 654. An act done by several is not actionable if a like act done by one alone would not be actionable. What one may lawfully do singly, two or more may lawfully agree to do jointly. 8 Cyc. 646, 647, citing 24 How. 407; 34 Md. 407; 54 Minn. 223, and other cases.

3. The so-called Sherman anti-trust statute of July 2, 1890 (26 Stat. at L. 209), prohibits in the District of Columbia "every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce." It is not to be presumed that Congress intended this to apply to a particular trade which it is the policy of Congress to restrict, such as the liquor business. If the matters complained of in the bill come within this statute, then the bill should have been filed by the United States district attorney, as provided by sec. 4 of the act. The statute (sec. 7) in such case gives the complainants a remedy at law. They have, therefore, no standing in court in this suit. *United States v. E. C. Knight Co.* 156 U. S. 1, 16.

Mr. Chief Justice SHEPARD delivered the opinion of the Court:

1. As it is charged in the bill, the combination between the [174] several defendants composing the Brewers' Association is, without doubt, a trust or conspiracy in restraint of trade within the 3d section of the anti-trust act of Congress (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3201), and the coercion attempted to be practised upon the Heurich

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company to compel it to enter the trust and obey its regulations of the advance of prices and the arbitrary division of customers is a palpable invasion of private right, as well as inimical to the interests of the public. *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 47, 48 L. ed. 608, 612, 24 Sup. Ct. Rep. 307; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 244, 44 L. ed. 136, 149, 20 Sup. Ct. Rep. 96; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 322, 323, 41 L. ed. 1007, 1021, 17 Sup. Ct. Rep. 540. The purposes and practices of the combination or conspiracy, as alleged, are equally violative of the common law, which prevails in the District of Columbia, and of which the 3d section of the statute is declaratory. *Northern Securities Co. v. United States*, 193 U. S. 197, 339, 48 L. ed. 679, 701, 24 Sup. Ct. Rep. 436; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159; *Nester v. Continental Brewing Co.* 161 Pa. 473, 24 L. R. A. 347, 41 Am. St. Rep. 894, 29 Atl. 102; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 181; *Richardson v. Buhl*, 77 Mich. 632, 6 L. R. A. 457, 43 N. W. 1102; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 190; *Jackson v. Stanfield*, 137 Ind. 592, 23 L. R. A. 588, 36 N. E. 345, 37 N. E. 14; *Gatzow v. Buening*, 106 Wis. 1, 14, 49 L. R. A. 475, 80 Am. St. Rep. 17, 81 N. W. 1003. The decisions of the highest courts of many other States are to the same effect.

2. The serious question for determination on this appeal is the right of the complainants to the equitable remedy of injunction to prevent the execution of the objects of the unlawful conspiracy. It is clear that they are not entitled to the relief asked in the first prayer of the bill, namely, that the agreement between the four members of the Brewers' Association be declared null and void. In respect of that agreement, merely, the concern of the complainants is not different from that of the [175] general public, whose interest can be protected in no other way than by a suit in the name of the United States. Nor can the attempted invasion of the rights of the Heurich Brewing Company by the immediate parties to that agreement, no matter how flagrant, be stayed at the suit of the complainants unless they can show that an



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irreparable injury will be done to themselves as the direct consequence of such invasion.

Their ground of complaint does not rest upon a contract with the Heurich company which the latter is about to break in obedience to the unlawful demands of the members of the trust and the compulsion exercised by them and their confederates. If such were the case, and that contract should be broken through the malicious interference of the defendants, the complainants might maintain an action against them for the damages occasioned thereby. *Angle v. Chicago, St. P. M. & O. R. Co.* 151 U. S. 1, 13, 38 L. ed. 55, 63, 14 Sup. Ct. Rep. 240. They could certainly maintain an action against the Heurich company for such breach, and they might possibly maintain one against all of the defendants, including that company, for threefold damages under the provisions of section 7 of the anti-trust act. Possibly, also, they might, under certain conditions, obtain an injunction against the Heurich company to prevent such breach.

Having no enforceable contract with the Heurich company, however, their right to any remedy depends entirely upon the condition that they have shown a case of legal injury which would directly result from the forcible and wrongful termination of their established trade relations with the Heurich company. Their allegations are in substance: That they have an established and profitable business in the sale of light beer of the Heurich company's manufacture; that they have been regularly purchasing such beer from the Heurich company at the price of \$3.60 per barrel and retailing it for a long period of time, during which they have established a lucrative trade and custom; that the Heurich company is unwilling to advance the price of beer to the proposed trust rate, and wishes to continue its sales to complainants at the present price; that, intimi[176]dated by the threats of the defendants and their malicious and oppressive acts, the Heurich company is about to yield to their demands, and will probably do so unless restrained; that the immediate and direct effect of such surrender will be an advance in the price of said beer to \$5.70 per barrel;

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that another and probable effect will be that complainants will be assigned as customers to some other member of the trust, against their will, and be unable to purchase the beer of the Heurich company at even the advanced price; that the immediate and direct effect of either act, and particularly of both combined, will be to deprive complainants of many of their regular customers, and diminish their receipts and profits to their irreparable loss and injury.

In the event of the execution of the conspiracy these conditions would entitle them to an action for such damages as they would be permitted to prove at law, with threefold recovery under the statute. *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307. But damages for acts which might work commercial ruin are not always recoverable at law, the rules of which relating to the measure of damages do not ordinarily warrant the assessment of consequential damages of an uncertain or speculative character, such as loss of trade and profits and the failure of credit and business. For such injuries the remedy at law, even under the statute giving a three-fold recovery, is inadequate and incomplete. In such cases, then, the jurisdiction of equity attaches, and to accomplish the ends of justice the writ of injunction will issue to prevent the doing or the continuance of the wrongful acts. *Watson v. Sutherland*, 5 Wall. 74, 79, 18 L. ed. 580, 583; *North v. Peters*, 138 U. S. 271, 281, 34 L. ed. 936, 939, 11 Sup. Ct. Rep. 346. See also *Vance v. W. A. Vandercook Co.* 170 U. S. 468, 480, 42 L. ed. 1111, 1116, 18 Sup. Ct. Rep. 645.

3. The contention of the appellees, that the exclusive right to equitable relief against the execution of conspiracies in restraint of trade is in the United States under the provisions of the anti-trust act, has not been seriously contested by the appellants, who claim the right independently of the statute. This, as we have seen, but declares the rule of the common law, then and now in force in the District of Columbia, under which any person may invoke the jurisdiction of equity to prevent an irreparable injury through such conspiracy. *Jackson v. Stanfield*, 137 Ind. 592, 23 L. R. A. 588,

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36 N. E. 345, 37 N. E. 14; *Hagan v. Blindell*, 6 C. C. A. 86, 13 U. S. App. 354, 359, 56 Fed. 696. That the statute makes a conspiracy in restraint of trade a crime, and provides a severe penalty therefor, does not necessarily impair the ordinary jurisdiction of equity, where the criminal acts work irreparable injury to property. *Re Debs*, 158 U. S. 564, 593, 39 L. ed. 1092, 1106, 15 Sup. Ct. Rep. 900.

And whatever may be the rule of its enforcement generally, neither by express terms nor necessary implication does it undertake to completely substitute its remedies for all others which any person might have had before its enactment.

As the complainant's right to a remedy in equity can be maintained without regard to the act of Congress, it is not essential to determine whether, if the wrongs complained of would be remediless save by resort to that act, any party other than the United States can invoke the jurisdiction of equity to restrain their commission. At the same time we are not to be understood as admitting the defendant's contention on this point. The decisions supporting that contention have all been in cases under the sections of the act relating to conspiracies in restraint of interstate commerce, in jurisdictions where the power of Congress is limited to that end, and where the jurisdiction of equity, it seems, was not invoked on the ground of special and irreparable injury to the complainant. *Metcalf v. American School Furniture Co.* 108 Fed. 909, 912, and cases cited; *Gulf, C. & S. F. R. Co. v. Miami S. S. Co.* 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 407.

Moreover, conspiracies in restraint of trade in the District of Columbia are determinable under the 3d section of the act, wherein, in the exercise of its plenary power of legislation, the Congress has enacted that "every contract, combination in form [178] of trust or otherwise, or conspiracy in restraint of trade or commerce, in any territory of the United States or of the District of Columbia \* \* \* is hereby declared illegal." \* \* \* The same section then declares the making of such contracts or the engagement in any such combination or conspiracy a misdemeanor, and provides a pen-

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ality. With the suggestion of these possible distinctions the question remains an open one.

4. The defendants Crown and Healy are not charged with an independent attempt to raise or fix the wages of the employees of the Heurich Brewing Company, and the rights of persons so engaged are not involved. The charge against them is that they have combined and confederated with the defendants composing the Brewers' Association for the sole purpose of aiding in the conspiracy to compel the Heurich company to join that association in order that its regulations looking to the advance of the price of beer and the allotment of customers to the several brewing companies may be enforced.

They are, therefore, equally within the scope of the remedy sought to prevent the irreparable injury of the complainants through the execution of the objects of the conspiracy entered into by their co-defendants.

For the reasons given, we are of the opinion that the learned justice presiding in the equity court erred in sustaining the demurrer and dismissing the bill. If the testimony shall sustain the allegations of the bill substantially in the particulars before summarized, the complainants will be entitled to a decree granting the injunction prayed for, limiting the same, however, to such acts as have relation to the particular injuries sought to be done them. The dissolution of the trust agreement between the members of the Brewers' Association, and the restraint of action injurious to the general public, can only be had at the suit of the United States.

The decree must be reversed, with costs to be taxed against the Washington Brewery Company and Harry Williams, who entered the demurrer to the bill, and also against the Abner-Drury Brewing Company, the Arlington Brewing Company, [179] and the National Capital Brewing Company, who have entered their appearance in this court in support of the decree appealed from. The cause will be remanded for further proceedings in conformity with this opinion. It is so ordered.

*Reversed.*

Syllabus.

[21] INDIANA MFG. CO. v. J. I. CASE THRESHING  
MACH. CO.\*

(Circuit Court, E. D. Wisconsin. August 22, 1906.)

[148 Fed. 21.]

**PATENTS—SUIT FOR INFRINGEMENT BY VIOLATION OF CONDITIONS OF LICENSE CONTRACT—LEGALITY OF CONTRACT.**—Where a bill alleges infringement of patents by the violation of the conditions of a license contract thereunder, and seeks in effect the specific enforcement of the contract, its legality is involved directly and not collaterally, and must be established before equity will grant relief.<sup>b</sup>

**MONOPOLIES—COMBINATIONS IN RESTRAINT OF TRADE—LICENSE CONTRACTS UNDER PATENTS.**—Conceding that a number of patents relating to the same art may be united by purchase in the same ownership, and that the grant of combination licenses thereunder on conditions specified may be within the lawful monopoly given by the patent law, yet to be immune from the operation of Anti-Trust Law of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200] the contract must be referable solely to the inventions under the patents, and intended to secure a monopoly in the beneficial use of specific inventions only; and where it extends beyond such purpose, and is intended to create a monopoly in the manufacture of the article to which the patents relate by securing and holding for the benefit of the parties all patents relating thereto under which such manufacture may be carried on, and not for the protection of patent rights, it may constitute a conspiracy and combination in restraint of trade in violation of the law.

**SAME.**—Complainant acquired by purchase the ownership of, or exclusive license to use, 21 United States and two Canadian patents, all relating to pneumatic straw stackers, and confederated all of the manufacturers of threshing machines in the country in a plan of uniform licenses under the combined patents with a uniform price fixed for the product and payment of a royalty to complainant for each machine until the end of the full term of any of the patents or of any which might thereafter be acquired by complainant. It thereafter acquired numerous other patents, until it held over 100 in all. The devices of such patents were not all capable of conjoint use in a single machine. None of them covered the pioneer invention of a wind stacker. A number covered non-interfering

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\* Reversed by Circuit Court of Appeals, Seventh Circuit (154 Fed., 365). See *post*, page 282.

<sup>b</sup> Syllabus copyrighted, 1907, by West Publishing Co.

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devices performing the same functions, and capable of independent use by different manufacturers, and many were of no practical value, and not used by any of the licensees. *Held*, that the purpose and effect of such system of contracts was to create a monopoly in wind-stacker products without reference either to any specific invention or the validity of any patent; that the agreement fixing the selling price of any form of the product was not attributable to any patent in the list nor to specific invention in either of the patent devices, and was not within the protection of the patent law, and that the combination created by such contracts was in restraint of trade and illegal as in violation of Anti-Trust Law July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200] and the contracts not enforceable in equity.

In Equity. On final hearing.

*W. H. H. Miller, Charles K. Offield, Charles C. Linthicum, Chester Bradford, Harold Taylor, and E. H. Bottum, for complainant.*

*Robert S. Taylor, Charles Quarles, I. K. Boyesen, and James H. Peirce, for defendant.*

SEAMAN, Circuit Judge.

The issues of law and fact in this case are complicated, and the volumes of testimony, exhibits, and [22] argument, are formidable, both in matter and in the various phases of the controversy. That they are difficult of solution goes without saying; and with the great interests involved and harsh defense set up, it is not singular that consummate ability is brought into the contest, with the contentions upon which the solution hinges strongly presented and combatted, and the testimony and discussion not free from acrimony.

The bill is filed to enforce the alleged rights of the complainant, under certain letters patent for improvements in straw elevators and stackers, and contracts with the defendants for manufacture and sale thereunder of "Pneumatic Straw Stackers," and the relief sought is plainly in the nature of specific performance of the contract, whatever may be the name applied to the suit. It is not alone for the recovery of the royalties promised—for which the remedies at law may be adequate—but for equitable relief, by injunction

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and otherwise, for the enforcement of that and other terms of the contracts referred to.

The answer is voluminous in recitals of alleged equities in favor of the defendants, setting up matter tending to three grounds of defense: (1) Invalidity of the contracts in suit, as parcel of an unlawful combination to suppress competition in trade; (2) violation of the contracts on the part of complainant, so that enforcement must be denied in equity; and (3) non-use by the defendant of the patent inventions. In argument the bill is challenged as multifarious, and for want of equity upon various propositions, which do not call for discussion, apart from one or the other of the defenses above mentioned.

The issue upon the validity of the contracts ("A" and "B") arises at the threshold, and its solution is imperative, as it clearly appears that one or both are part of the alleged combination agreement. These contracts are set up in the bill and are in evidence, as one of the fundamental grounds for the relief sought, and unless they are valid the rule is elementary (*McMullen v. Hoffman*, 174 U. S. 639, 654, 19 Sup. Ct. 839, 43 L. Ed. 1117) that "no court will lend its assistance in any way towards carrying out the terms" of such contract, "nor will a court of equity enforce any alleged rights directly springing" therefrom. So, their validity must be ascertained, under the issue, as a condition precedent to any relief in equity, irrespective either of the seeming want of equity in the attitude of the defendant respecting such issue, or hardships which may be imposed upon the complainant. The contention that the complainant may rest claim for infringement upon the patents alone, without reference to the license contracts, under the rule that use of the invention contrary to the terms of license constitutes infringement, is without force, if assumed to be otherwise tenable, for the reason that bill and testimony claim the benefits of the contract, and each is wholly directed to enforcement of its terms. Indeed, the relief prayed for in every aspect requires the contract for its sanction. With the case thus predicated, the validity of the contract is directly and primarily involved, and the authorities cited and pressed for [23] con-

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sideration as denouncing collateral inquiry or attack (vide *Harrison v. Glucose Sugar Ref. Co.*, 116 Fed. 304, 307, 53 C. C. A. 484, 58 L. R. A. 915, and *Dennehy v. McNulta*, 86 Fed. 825, 827, 30 C. C. A. 422, 41 L. R. A. 609, in this circuit, and *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 545, 22 Sup. Ct. 431, 46 L. Ed. 679) are plainly inapplicable, and the test mentioned in the *Wiswall Case* (86 Fed. 671, 674, 30 C. C. A. 339) for marking the distinction between direct and collateral attack, lends no support to the contention upon that point. Were it questionable, in any view of the subject-matter of the bill, whether it was open to such inquiry, doubt would be set at rest by these express allegations thereof; that like contracts were made with other manufacturers to the extent of embracing in the "license system" thereof "substantially all manufacturers of threshing machinery on this continent," and all pneumatic straw stackers made in the United States and Canada; that violations by the defendant—sale at less than the price fixed being one of the charges—endanger the entire system, leading "to dissatisfaction and unrest on the part of the other licensees" and encouraging like violations. Whether the system thus referred to may not be within the lawful exercise of patent privileges, is, of course, another question, dependent in each case upon the facts which enter into the arrangement, but it cannot be doubted that the contracts which make up the system are open to challenge, either for monopoly not authorized by the patent law, or for other taint. Equity is not content to enforce an agreement upon its form alone, but will search beyond its terms to ascertain the true object, when the issue of legitimacy is raised. I am satisfied that such issue is presented here, and must be determined under the evidence.

The question of the lawfulness of the monopoly created by the contracts and license system in suit is one of mixed law and fact. The substantial facts are well established, if not conceded, and the inferences of fact impress me as free from difficulty, unless it be in reference to the nature of invention in one or more of the patents, which enters into the ultimate inquiry of the effect of the combination. Laying out of view



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the feature of property in patents (owned or to be acquired) involved in the argument, the doctrine is settled that the monopoly in trade created by the agreement violates the express terms of Act Cong. July 2, 1890, c. 647, § 3, 26 Stat. 209 [U. S. Comp. St. p. 3200], known as the "Sherman Anti-Trust Act" (as well as the common-law) so that the contract cannot be upheld, unless saved from invalidity by the element of patent license referred to. *Bement v. National Harrow Co.*, 186 U. S. 70, 92, 22 Sup. Ct. 747, 46 L. Ed. 1058; *Northern Securities Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679. On the other hand, the grant of a patent creates a lawful monopoly, for the term of the grant, in use of the invention, and the right of the owner (patentee or assignee) is well recognized, to parcel out, restrict, or withhold such use, at will; and he may fix the price at which the patented article or product shall be marketed. With the aggregation of patents embraced in this combination agreement how[24]ever, the question of the applicability in all phases of the one and the other of the above-mentioned rules is not, as I believe, settled by the authorities. The decisions are not harmonious in cases which seem to be analogous in certain features, so that the question, broadly stated, remains at large, to be determined upon general principles which are settled, both in reference to the public policy of the laws respectively which restrain general monopolies, and those which confer a limited monopoly for inventions and literary productions, and in the light of the leading opinions cited. Nor can the conclusions yield to the influence (suggested in argument) of the grave interests which may be effected upon the one side, or of privity or alleged misconduct or inconsistent acts of the other party.

The primary contract ("A") grants license to the manufacturers under 21 United States patents expressly named, and two Canadian patents, "relating to the art or method of taking straw and dust from threshing machines," which the licensors "controls by ownership or exclusive license," and extends "until the full end of the term of any such patent" owned by it, or of the license under patents which are thus controlled, together with "any inventions which may be here-

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after acquired " by the licensor. The terms to be observed do not require specification for the present purpose, except that the royalty to be paid is \$30 on each stacker made " embodying any of said inventions or improvements," and " the selling price to users of machines " thereunder must be \$250, when sold on time, or \$235 for cash sales, with agency commissions limited to \$25; and the licensee is not to dispute the patents " directly or indirectly " nor " make their alleged invalidity a defense " in any manner. This agreement was executed between the present parties April 8, 1895. On January 20, 1899, they made a supplemental agreement (" B ") in compromise of differences, which I deem immaterial for the present consideration, unless it be in the provision that the licensee " will not, either directly or indirectly, raise any question as to the validity of the contract (" A ") which it reaffirms.

This license agreement, upon its face, does not depart, as I assume, from the customary forms of a license system, except in the great number of patents included, and, perhaps, the extent or indefiniteness of the term which may be implied from the recitals. The testimony is voluminous in reference to numerous additional patents which have been acquired by the complainant, from licensees and others, in the development of its system, so that its so-called " patent properties exceed 100 in number," although five only are alleged in the bill to be invaded by the defendant's structure. While I have deemed it unnecessary to examine this array of patents, in detail, except the five referred to—not even to ascertain their relation respectively, remote, or otherwise, to the wind stacker art—these general facts are either conceded or undisputed. Many of the patents named in the contract and subsequently acquired are of no substantial value; many are neither used nor applicable for practical use by any of the licensees in the system; some are used only by single licensees; and, however the fact may be in reference to the five alleged to be infringed, the [25] patent devices combined under the terms of the license are not, " in whole or in part, capable of conjoint use in a single machine." On reference to the subject-matter of these patents, it is obvious upon their face that all

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are not of such relation and character that each is needful, in any sense, to protect the just monopoly granted to any patentee in the list, as pioneer or subordinate invention, although a portion may be so related and useful to one another, when associated under the license. Moreover, the fact is not only presumptive from the grants, but appears on the face of the patents respectively—whatever view is adopted of the legitimate scope of invention in the alleged pioneer pneumatic stacker—that more or less of the patents included in the license system are not in interference with either of the prior inventions disclosed in any of the patents; and that such devices are capable of independent use in an independent mechanism of the art.

Upon these premises alone—of numerous patents covering various inventions in the ownership of a single purchaser, and license issued thereunder for exclusive use of the inventions by licensees upon the terms specified—the rule is assumed (for the present consideration) to be settled that monopoly of such inventions is within the objects of the grants, and that the transactions do not, *prima facie*, violate the general provisions of law against combinations in restraint of trade. *Bement v. National Harrow Company*, 186 U. S. 70, 93, 22 Sup. Ct. 747, 46 L. Ed. 1058. Nevertheless, I am satisfied that monopoly thus secured to be immune from the anti-trust act, must be referable solely to the inventions under the patents, and that a combination of licensees formed thereunder may create a monopoly which exceeds the legitimate scope of the patent privileges, not within the contemplation of the provisions for the grant, and thus violate the general act referred to—with or without intentional co-operation on the part of the licensor. In other words, while exercise of the right which the authorities concede to be inherent in the grant, of obtaining several patents by purchase and combining them in a license, results, in a sense, in combination of licensor and licensees to uphold monopoly of the inventions, which may be lawful, I am of opinion that such combination must be limited to the express policy and object of the patent grant—monopoly in beneficial use of a specific invention—and when extended beyond that purpose by concert of action, may thus be brought

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within the inhibition of the general law; that this right to assemble and hold patent properties, alike with the instance in the Northern Securities Case, may be abused; may be the means and guise for creating what has been aptly termed "a conspiracy of monopolists," so that the act which is otherwise innocent and within individual rights becomes unlawful as opposed to public policy in the methods employed; and that the transaction must be probed, under the issue beyond the license terms, to ascertain the true objects sought and obtained by this combination.

The testimony is too voluminous for recapitulation here, but the general plan and purpose of the system promoted and carried out by the complainant, upon its own showing, may be thus summarized: [26] Owning the alleged pioneer patents of Buchanan for pneumatic straw-stacker devices (No. 297,561, of 1884, soon to expire, and No. 467,476, of 1892), under which its predecessor corporation was operating, the use of such general pneumatic means in the threshing machine art was deemed of great value. Means along the same line were soon devised by other inventors—notably the patents expressly included in this suit, Nethery's (1893) No. 493,734; Nethery's (1894) No. 517,475; Landis' (1894) No. 512,553; Landis' (1894) No. 514,266—and were used or about to be adopted by threshing machine manufacturers. By way of dominating the art these patents were acquired by the complainant (or its predecessor), and the manufacturers of threshing machines throughout the country were confederated in a plan of concerted license under the combined patents, with a uniform price fixed for the product. Certain of the patents were taken out in Canada for extension of the system there, and all manufacturers supplying both countries with threshing machines were brought into the arrangement, which included the purchase from licensees and others of any patents, either in use or liable to "disturb the harmony" of the plan. In the course of carrying forward the system, other patents were acquired from time to time—both from subsequent licensees to bring them in and from other patentees when conflict seemed possible—all within the contemplation of the uniform license which was expressly designed to preserve to the licensor the bulk royalty named in

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the license, and as well to preserve among the manufacturers unity in the selling price of all machines made under either of the patent devices, irrespective of validity or value of either of the purported inventions. The contract "A" in suit is one of the series uniting the threshing machine manufacturers—for other kindred manufacturers were ultimately included as joint licensees—and each licensee entered the system with full understanding of and concurrence in the design. The complainant was, therefore, the promoter of a two-fold combination of numerous patent properties and of all manufacturers of threshing machines, whereby great interests were affected—unquestionably within the language (if not the scope) of the anti-trust act, as "in restraint of trade or commerce among the several states, or with foreign nations" (section 1 [U. S. Comp. St. 1901, p. 3200]), or "to monopolize any part of the trade" thereof (section 2 [U. S. Comp. St. 1901, p. 3200]).

Indeed, the design as above recited is expressly referred to in one of the briefs of the complainant, in various forms, by way of indicating equities in favor of the relief sought by the bill, of which the following citations are examples:

(a) In one paragraph the complainant is thus extolled:

"Not only is it the owner of a vast number of letters patent identified in this record relating to all phases and conditions of the wind-stacker industry, but it also stands before this court as the practical creator of that industry, and without whose faith in such industry, and the patents represented thereby, such industry would not to-day exist, or if existing, would have existed in the shape of discordant factions, contests in the courts, injunctive proceedings against manufacturers and users, as widely variant as they are patentees of a hundred patents."

[27] (b) In black-faced type, the benefits of the contract are thus stated:

"The royalty of \$30 per wind stacker to complainant; the profit of \$100 per wind stacker to defendants; and the price of \$250 per wind stacker to the ultimate purchaser or user or farmer were entirely 'satisfactory' to all."

(c) The testimony is mentioned as convincing:

"That these defendants have received from this complainant a protection representing a large money consideration over and above the

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royalty fee of \$30"; and, "that the complainant went widely beyond any duties imposed upon it by the terms of the license, and that to prevent any possible claim against any of complainant's licensees for infringement of letters patent, and to protect each licensee in the undisturbed conduct of its business of the manufacture of 'wind stackers,' complainant has simply paid out vast sums of money in the purchase of letters patent, the existence of which in the hands of third or hostile parties might be used either as weapons of direct assault against complainant's respective licensees, by possible suits for infringement, or might be used in particular localities to destroy the business of particular licensees by reason of an attempt to manufacture wind stackers in destruction of an established trade by such licensees, respectively."

(d) And again:

"The resulting advantages of the payment of these vast sums of money, and of the purchase of these patents by complainant, all enuring alone to the benefit of the respective licensees (and to none other more than those defendants), would, in itself, as a consideration, justify the payment of a license fee or a reasonable compensation in distinguishment from the monopoly represented by the patents identified by the license right; and this fact is just as certain, and these conditions are just as operative as a protection to these defendants under their license, even if by any chance defendants could invent a wind stacker so radically different from the wind stacker of all of the patents of complainant as admittedly not to come under or infringe any claim of any such patents."

(e) So, the liberality of the contract is referred to as exempting the defendant from royalty, if its so-called Norton Stacker lay outside of any of the patents," while entitled to "have all the benefits and advantages of that license without its royalty burdens," and the further benefits are thus enumerated:

"The defendant could and would sell its wind stackers at the price of \$250, because that price is the price fixed for the market by complainant's monopoly, and adhered to by every other manufacturer in the United States and Dominion of Canada, and there would be no reason why this single defendant, as an exception, should sell at a less price. Complainant's license contract and their more than 100 patents would be equally as valuable to defendant as to the other licensees, because such patents are a barricade and protection from any other manufacturer entering the field of industry, the practical result being that the defendant would take his \$100 profits upon each wind stacker manufactured and sold, and this solely by reason of the fact of complainant's patents and the binding license obligations upon all other wind-stacker manufacturers of the country."

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(f) The further consideration for the agreement is urged, that the complainant was to withdraw from the field as manufacturers, and thus free the licensees from such competition.

These propositions, therefore, impress me as clearly established by the evidence: That monopoly in the general so-called "wind-stacker" products was both intended and accomplished without reference either to any specific invention or the validity of any patent and not referable alone to any patent or group of patents; that the several [28] patents purporting to cover that field, which were purchased by the complainant, were potent if not essential means to the end thus sought, and the other patents which were acquired from time to time were at least helpful; that concurrence of the manufacturers, in unity of action, to prevent competition in "wind stackers" of any form, was alike potent and plainly essential to carry out the plan; and that the agreement fixing the selling price for any form of the product was solely for the benefit of the manufacturers—the basis of their concurrence—and, in no sense, attributable to either patent in the list, nor to specific invention in either of the patent devices. Doubtless, the complainant's initial object was a plan for royalties from all manufacturers, with its Buchanan patents as the germ (especially the first one, with brief term to run) and acquisition of all other patents, which might be brought into competition, both by way of entrenching and perpetuating its claim, and to reach all who were engaged in the manufacture of the various forms of "wind stackers." While such plan of cumulative ownership of patents, for the purpose of obtaining royalty alone under the protection of all, is sanctioned by the authorities—notably, *Bement v. National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 48 L. Ed. 1058—as between licensor and a licensee, I am of opinion that this combination of all manufacturers under the plan of acquisition and for the purposes above outlined, is without such sanction, so that no escape appears from the conclusion that it violates the anti-trust act, if not the common law. It is unmistakably a combination of manufacturers to restrain competition in the make and sale of their products, with merger of the patents in one ownership as a means employed for that purpose, and thus not entitled to the beneficent rule of the patent law

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which intends protection only of monopoly of the use of specific invention—not to foster combinations of patentees and manufacturers for general monopoly.

The complainant relies upon the line of authorities defining and upholding the rights of monopoly under patents (as I have above summarized their rule), with special reference to these recent cases as decisive: *Bement v. National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, and *United States Con. S. Raisin Co. v. Griffin & Skelly Co.*, 126 Fed. 364, 61 C. C. A. 334. The first-mentioned case is controlling in so far as it is applicable here, and is not without force in the one aspect of combining numerous patents in single ownership and granting license thereunder upon terms analogous to the single license set out in this bill. But the case there decided is plainly distinguished by the express terms of the opinion from the combination between the licensor and the various manufacturers above indicated. That was a hearing on error to the Supreme Court of New York (after the state Court of Appeals had reversed for want of jurisdiction to review the facts), and the only reviewable question, as stated in the opinion, was the validity of the single contract in suit, with no facts found of a combination of licensees as set up there in the answer. So, the question of the effect of such alleged combination was not reviewable under the findings, and was excluded from consideration, as the opinion carefully and repeatedly points [29] out; and it furnishes no support for the agreement in suit. The *Raisin Co. Case*, supra, if otherwise applicable, is expressly founded upon a view of the last-mentioned decision of the Supreme Court which overlooks the distinction referred to, as I understand it, and I am unable to concur in that view; and I deem it distinguishable, in any event, from the combination which appears in the case at bar.

On the other hand, the decisions in the Third Circuit, in *National Harrow Company v. Hench* (C. C.) 76 Fed. 667, in the Circuit Court and upon appeal, 83 Fed. 36, 27 C. C. A. 349, 39 L. R. A. 299, impress me as stating the true rule which should govern the present contract, and the conclusion of illegality in the present combination may well rest on the grounds there expressed.



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I am further impressed, however, with special features, which enter into this arrangement, in reference to the patents (not appearing in any of the cases called to attention), lending force, as I believe, to the contention of unlawful monopoly. When the undertaking was started, the pneumatic straw stacker was not a mere experiment, but in practical use, as an attachment to or part of the threshing machine. Its usefulness and popularity were well recognized, in various of the patent forms. Manufacturers of threshing machines were either making them under a patent, or procuring them from a maker, to be used with the machine; and many, if not all, of such manufacturers were desirous of license, under one or another of the existing patents, to make the stacker in connection with their machine. The five patents named in the bill as infringed were then in the field—with others listed in the license, which do not call for special reference—as competitors for that trade; and it is unmistakable that this condition was a moving cause for the combination. Consideration of these patents, in the light of the prior art and in relation to each other, is of interest—and in one view essential—to show their bearing upon the plan. Upon the issue of infringement they were elaborately discussed in the oral arguments (and as well in the briefs), and I have given much time to their careful examination. For the purposes of the present point, however, it seems inadvisable to discuss in detail the claims under either, or the prior art (upon which direct issues may hereafter arise), and a summary statement of my deductions and their basis will serve for application here.

On behalf of complainant, it is contended that Buchanan's patent No. 467,476 (which it then owned) was the first successful stacker in this art—the pioneer "wind stacker"—with the four succeeding patents of Nethery and Landis (Nos. 498,734, 517,475, 512,553, and 514,266) as mere improvements, but entitled to liberal interpretation. This view of the second Buchanan patent, as dominating the art, is untenable, upon my understanding of the prior Buchanan patent No. 297,561 (of 1884) and various earlier patents and publications in evidence; and the Nethery and Landis patents impress me as departures from any patentable novelty in

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No. 467,476 of Buchanan—not in conflict or dominated by it—but alike with its improvements upon No. 297,561 and other prior devices. The first Buchanan patent of 1884 may fairly be assumed as the pioneer in this country of the present form of pneumatic straw stacker, although all its general features [30] are anticipated in the British patent of Brinsmead (1868) and other early foreign devices shown in patents and publications. His second patent (in suit) is unmistakably of the same general form, with improvement in stacking function through means for vertical movement of the trunk and other details; so Netherly and Landis have improved with other specific means, but neither has departed from the general form and pneumatic idea disclosed in the original Buchanan patent. With the expiration of that patent, at the utmost, each of the improvers was entitled to the use of its disclosures, and I am satisfied that no invention of either improver was invaded by the other. In Buchanan's second patent the improved means was adapted from the old art—a mere development of the primary conception, when called for in practical use, to accommodate the stacking—of undoubted value, but not entitled to functional domination.

As non-interfering patents of conceded utility each was open to independent use by manufacturers under license from the patentee, and it must be inferred that the pooling of the patents and enlistment of all manufacturers in a pool contract was mutually entered into in that view, and with special reference, on the part of complainant, to the early expiration of the first Buchanan patent. The royalty value of each rested upon the practical value of the improvement and the market was at hand, equally open to each, before the combination; each appears to have meritorious features to give it standing in that market. Thus all of the patents above specified—and others, as well, included in the arrangement—were in the attitude of competitors with each other for use under royalty, by the manufacturers, while the manufacturers were in competition with each other, both for bargaining to obtain license and in sale of their products. The patentees were among themselves, therefore, in that sense, equally with the manufacturers, rivals in trade for royalty

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use—presumptively so as to all in the same line of use, and as matter of fact in reference to those above mentioned—and thus, as I believe, within the letter and policy of the law which prohibits combinations between such “possible rivals in trade.” *Northern Securities Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679; *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518; *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 409, 26 Sup. Ct. 66, 50 L. Ed. 246. The settled rule in reference to the privileges vested in patent property is not overlooked in this view. As tersely stated in the opinion by Judge Baker, speaking for the Circuit Court of Appeals, in *Victor Talking Machine v. The Fair*, 123 Fed. 424, 426, 61 C. C. A. 58, 60, “without applying to the Patent Office, one may make and use and sell the device that embodies his invention. That is his natural right. Within his domain, the patentee is czar. The people must take the invention on the terms he dictates, or let it alone for 17 years. Cries of restraint of trade and impairment of the freedom of sales are unavailing, because for the promotion of the useful arts the Constitution and statutes authorize this very monopoly.”

Nor do I overlook the recognized right (as before mentioned) of the patent owner, as such czar “within his domain,” either to suppress his own or prescribe the terms of its use by others; or to own [31] and enforce monopoly under several patents. Nevertheless, as I conceive the rule, without the domain of monopoly for each individual invention, the owner stands on an equality with all other property owners and is equally amenable to the general law against confederation with others, tending to create another kind of monopoly, through concerted action of the confederates.

The patent privilege is granted by the government by excluding others from its use, unless licensed by the patentee as owner; and this exclusive use is strictly enforced by the courts; and if properly termed a monopoly—a definition not accepted by all the authorities—it is readily distinguishable from that of the common law. For enforcement it requires neither the aid of other patent privileges, nor concurrence of third parties; nor can combination with other patents lend

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support for its judicial enforcement. The right of the owner to purchase and enjoy other patent privileges by way of investment or increase of royalties, together with all other recognized property rights therein, except the exclusive use of each invention conferred by the grants are held alike with the rights common to other property owners to make them profitable. So, the nature of the patent privilege confers no immunity to combine with other patentees or under other patents in a confederation of users, when such combination is prohibited generally, as in the terms of the anti-trust act. While purchase alone of the outstanding patents, interfering or noninterfering, by the complainant, might be within its rights, the combination which was entered into, with that as one of its means, as I believe, violated the law. The arrangement was not within the rule, which is of general application, that differences may be composed and litigation settled between the parties by bona fide compromises. Nor was the foreclosure which it contemplated, of all questions as to the validity or value of any patent brought into the combination, justifiable under the circumstances; and I am of opinion it was opposed to public policy.

With the contracts thus viewed, neither is enforceable in equity, and the bill must be dismissed.

Decree will be entered accordingly, but final orders respecting the funds in court will be reserved until the parties can be heard on application for appeal and stay, if so advised.

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[486] UNITED STATES *v.* TERMINAL R. ASS'N OF  
ST. LOUIS ET AL.<sup>a</sup>

(Circuit Court, E. D. Missouri, E. D. October 25, 1906.)

[148 Fed. 486.]

**WITNESSES—PRODUCTION OF DOCUMENTS—POWERS OF COURT OF EQUITY.**—A court of equity has power to compel the production of books and papers by virtue of its inherent and general jurisdiction, and this power is not confined to the parties to the suit, but extends to third persons.<sup>b</sup>

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<sup>a</sup> See *U. S. v. Terminal R. Ass'n* (154 Fed. 268) ; *post*, page 265.

<sup>b</sup> Syllabus copyrighted, 1907, by West Publishing Co.

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**SAME.—SUBPŒNA DUCES TECUM—REFUSAL TO OBEY.**—A witness cannot excuse his failure to produce books and papers in obedience to a subpœna duces tecum on the ground that the evidence called for is immaterial, irrelevant, or incompetent under the issues in the case; that question being one for the court to determine when the evidence is offered.

**SAME—GROUNDS FOR ISSUANCE.**—To entitle a party to a subpœna duces tecum to require a witness to produce books and papers, it is not necessary that the court should be satisfied beyond a reasonable doubt of their relevancy and materiality as evidence, but a showing which establishes a reasonable ground to believe they may be so is sufficient, especially where the application is made by the United States in a suit of public interest and importance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 20.]

**SAME.**—The fourth constitutional amendment, prohibiting unreasonable searches and seizures, affords no protection to a witness for his refusal to produce books and papers admittedly in his possession in obedience to a subpœna duces tecum issued by a court of equity.

In Equity. On motion of R. M. Fraser to quash subpœna duces tecum.

*John F. Lee* and *E. C. Kramer*, for the motion.

*D. P. Dyer*, *C. H. Krum*, *E. C. Crow*, and *Chas. Nagel*, opposed.

FINKELNBURG, District Judge.

The matters now submitted to the court arise in a suit brought by the government of the United States against the Terminal Railroad Association of St. Louis, the St. Louis Bridge Company, the Merchants' Bridge Company, the Wiggins Ferry Company, the Merchants' Terminal Railway Company, and 14 trunk line railroad companies engaged in interstate commerce to and from the city of St. Louis, besides some other parties defendant unnecessary to mention for the purpose of this inquiry.

The bill of complaint is lengthy. It is largely historical. It recites the history of the St. Louis Bridge (commonly known as the "Eads Bridge"), the Merchants' Bridge, and the Wiggins Ferry, the three instrumentalities for transporting freight and passengers across the river at St. Louis, Mo.,

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and it also gives the history of the various terminal railway companies on both sides of the river. After a great deal of detail the bill of complaint, in substance, culminates in the charge that the defendants, intending unlawfully to monopolize trade and commerce, and intending to restrain and suppress competition in interstate commerce at St. Louis, Mo., and East St. Louis, Ill., effected an unlawful combination or consolidation of said bridges and ferries, and of the terminal railways leading up to the same, in the hands of the Terminal Railroad Association of St. Louis, and that said Terminal Railroad Association of St. Louis is, in fact, owned and controlled by the 14 railroad companies who are made defendants in this case. The bill then in effect charges that by reason of the facts set forth the 14 railroad companies aforesaid, through said Terminal Railroad Association, control all the means for transporting freight and passengers across the Mississippi river at St. Louis, Mo., that they arbitrarily fix and exact unreasonable charges and tolls to be paid for freight and passengers to be hauled and transferred in interstate business between Illinois and Missouri, and that all competition has been stifled and destroyed to the detriment of the public and in violation of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], to protect trade and commerce, commonly known as the "Sherman Anti-Trust Act." The bill finally charges that the properties aforesaid are so operated by the defendants as to constitute a monopoly in their employment and conduct of interstate commerce between the states of Illinois and Missouri and the various states of the United States and foreign countries, and so as to exclude from participation therein all carriers other than those named as parties to the alleged unlawful combination and conspiracy.

The answer of the defendants is also lengthy. It also goes over the history of these bridges and ferries and of the terminal railways leading to and from the same, and sets forth in detail the various transfer and traffic arrangements by which they have come under the single management of the Terminal Railroad Association of St. Louis; but defendants deny that the various steps by which this was done were un-

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lawful, or that it was intended thereby to restrain interstate commerce or stifle competition, or establish a monopoly, or that a monopoly was, in fact, created thereby. Defendants deny all the charges of unlawful combination, conspiracy, or contracts or agreements to restrain or monopolize in any manner or to any extent interstate trade or commerce, and they deny that they have established or exacted unreasonable or exorbitant rates, tolls, or charges. On the contrary, defendants aver that the bringing together of all the former disjointed and diverse interests under the single management of the Terminal Railroad Association resulted in the better handling of traffic, both freight and passenger, and that, instead of restraining trade or commerce, it fostered and promoted the same by affording greater and more expeditious facilities at lower charges. I have stated the issues made by the pleadings only in a very general way, without any attempt at great accuracy, and only in so far as they seem to me to bear on the question now before the court.

It appears from the pleadings, then, that this case is one of public interest, not only to the people of St. Louis, but indirectly to the people of the United States generally, and the bill of complaint states that it is brought by the United States Attorney for the Eastern District of Missouri under the direction of the Attorney General of the United States. When the issues were made up, an examiner was appointed to take the testimony under the sixty-seventh rule governing proceedings in equity, and the taking of this testimony has been in progress for several months, and is now in progress before such examiner. A few days ago the attorneys for the government came and by an ap[488]plication in writing showed to the court that certain record books and papers of certain "traffic associations" and "freight committees" in this city were needed by the government as evidence before the examiner in this case. They asked for a subpoena duces tecum against R. M. Fraser, in whose possession these records and papers were alleged to be. The application was in the usual form, and was verified. A subpoena duces tecum was thereupon issued for the production of these books and papers before the examiner. The associations whose records

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are called for are the following: The St. Louis coal traffic bureau and the St. Louis Coal Traffic Association, the east-bound freight committee of St. Louis, the St. Louis & Cincinnati freight committee of St. Louis, and the St. Louis & Belleville freight committee.

Mr. Fraser, the person against whom the subpoena was directed, appeared before the examiner, stated his official connection with these associations, and admitted having the books and papers called for in his possession, but refused to produce them, and he has filed a motion to vacate the subpoena for certain reasons in his motion set out, and which will be presently referred to. The attorneys for the government, on the other hand, have moved for and obtained an order on Mr. Fraser to show cause why he should not be committed for contempt of court, to which counsel for Mr. Fraser have filed a return, setting up substantially the same matters which are made the ground for the motion to quash the subpoena. Both these applications have been heard and are submitted together.

The first reason stated in the motion to quash is that the traffic associations and freight committees whose books and papers are called for are not parties to this suit, and that therefore this court has no right to require their production. This ground for the motion was not much relied on in the argument, and clearly it involves a misconception of the powers of this court. It is well settled that a court of equity has power to compel the production of books and papers in virtue of its inherent and general jurisdiction, and this power is not confined to the parties to the suit, but extends to third persons. *U. S. v. Babcock*, 8 Dill. 569, Fed. Cas. No. 14,484; 3 Greenleaf on Evidence, § 305; *Hale v. Henkel*, 201 U. S. 43, 73, 26 Sup. Ct. 370, 50 L. Ed. 652.

The second ground in the motion to quash is that the evidence called for in the subpoena "is wholly immaterial, irrelevant, incompetent, and improper evidence to the issues in said cause." This objection deals with the materiality of the proposed evidence when the books and papers are produced, and it might be sufficient to say that it is no excuse for not producing them at all. In other words, it is not for the



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witness to say, "I will not produce these records and papers because I believe, or I am advised, that they would not be material if I did produce them." That would leave the determination of the whole matter with the witness himself and the court would be powerless. Nor, it seems to me, can this question be properly decided in advance by this court upon an application to produce these books and papers, but must ultimately be passed on at the hearing when the trial court has all the evidence before it and the actual situation of the case with all [489] its issues and bearings is made apparent to the court, so that it may act intelligently, and so that a refusal to admit the testimony may be excepted to and made part of the record in case of an appeal. *Edison Co. v. Electric Co.* (C. C.) 44 Fed. 296; *U. S. v. Babcock*, 3 Dill. 569, Fed. Cas. No. 14,484. I cannot bring myself to agree with the contention of respondent's counsel that it devolves upon the government to satisfy this court, beyond any reasonable doubt, that the books and papers called for in this subpoena are relevant and material. I think that for the present all that is required is that there should be shown to be a reasonable ground to believe that they may be relevant and material—not palpably foreign to the subject of inquiry—and I think a sufficient showing has been made in that direction. The government attorneys state to the court that the books and papers called for are relevant and material evidence on behalf of the government, and that it is necessary for the government to introduce them in evidence. In the case of *U. S. v. Babcock*, 3 Dill. 566, Fed. Cas. No. 14,484, the court, under similar circumstances said: "When the district attorney asserts that they are material papers, we must assume, for the present, that he is fully informed and that they are material." The names of these traffic associations and freight committees indicate that they deal with the subject of transportation and freight rates at St. Louis, Mo., the identical subjects involved in the issues in this case. The oral testimony given by Mr. Fraser before the examiner fully confirms this. Their records and circular letters would therefore naturally appear to bear upon the issues in this case. It was suggested in the oral argument by counsel for respondent

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that these traffic associations operated only upon transportation from East St. Louis eastwardly; but the interlacing of transportation and rates between railroads and terminal facilities on the east and west side of the river at St. Louis is such that this court would not be justified in assuming that they are absolutely distinct for the purpose of this inquiry. The testimony of Mr. Fraser also shows this. Furthermore, it is alleged, and not denied, that 11 out of the 14 railroad companies which are defendants in this case are also members of these traffic associations or freight committees. I think these things taken together are sufficient to raise a reasonable presumption of relevancy and materiality for the purposes of this motion. The *Crocker-Bullock Case* in the 134th Federal Reporter (C. C. page 241), relied upon by counsel for respondent, was a case of legal privilege claimed by the witness, and the case was decided upon that point. The case of *Southern Ry. v. North Carolina Corp. Commission* (C. C.) 104 Fed. 700, was also a case of privilege claimed on the part of the witness. Nothing of the kind is claimed in the case at bar. Here there is no claim of legal or personal privilege, nor is it shown that the witness or those whom he represents will be prejudiced in any way by the production of these books and papers, so that it resolves itself into a simple question of relevancy and materiality raised by the witness in this case.

The third and last ground mentioned in the motion to quash is that the things called for are the private books and papers of these freight committees and bureaus and to require their production would be in [490] violation of the provisions of the fourth amendment to the Constitution of the United States, in this: that it would be "an unreasonable search and seizure of the books, papers, and files of said committees and bureaus." Conceding that a subpoena duces tecum may under certain circumstances be equivalent to a search and seizure, I can see nothing unreasonable in the issuance of this subpoena in this case. Considering the nature of the issues, their breadth and importance, the character of these traffic associations, their relation to the defendants and to the subject of this inquiry, I think there is nothing unreasonable in the number of the books called for or the

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description of what is wanted. Mr. Fraser admits that he has these books in his possession; in fact, he has brought them into court on the hearing of this motion, but declines to produce them before the examiner for the purpose of testimony, though ordered to do so by a court of competent jurisdiction. The fourth amendment is no protection to him.

The subject of transportation has of recent years become one of great public concern. Much legislation tending to control or regulate it has been enacted by both state and federal governments. To a great extent the subject has become *res publicæ*. I think the books and papers of these traffic associations called for in this subpoena ought to be produced, and that the private interests and convenience of those associations, if any, ought in a matter of this kind to give way to the exigencies growing out of this suit.

The motion to quash will therefore be overruled.

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[924] LOEWE ET AL. v. LAWLOR ET AL.\*

(Circuit Court, D. Connecticut. December 7, 1906.)

[148 Fed. 924.]

**MONOPOLIES—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE—**

**BOYCOTT—TRADE UNIONS.**—The action of the members of a labor union in attempting to compel a hat manufacturer to unionize his factory by leaving his employment and preventing others from taking employment therein, and also, with the assistance of the members of affiliated organizations, by declaring a boycott upon his goods in other states into which such goods have been shipped for sale at retail, does not have such relation to interstate commerce as to constitute a combination or conspiracy in restraint of such commerce in violation of the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]).<sup>b</sup>

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\* Judgment reversed by the Supreme Court (208 U. S., 274). See *post*, p. 323. Upon trial in the Circuit Court, complainants were given judgment in the sum of \$232,240.12, which judgment was affirmed by the Circuit Court of Appeals, Second Circuit (187 Fed. 522). See Vol. 4, p. 264.

<sup>b</sup> Syllabus copyrighted, 1907, by West Publishing Company.

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At Law. On demurrer to complaint.

See 142 Fed. 216.

*Davenport and Banks*, for plaintiffs.

*John K. Beach, John H. Light, De Forest and Klein and Howard W. Taylor*, for defendants.

PLATT, District Judge.

Some of the grounds of demurrer are general, attacking the entire complaint, and others are special, affecting only certain portions which are said to be irrelevant or evidential. It is with the former class that we are at this moment particularly concerned.

The complaint, stripped to the bone, sets forth, in substance, the following situation: The defendants are members of a local union in Danbury, Conn., which is a subordinate branch of the United Hatters of North America, which embraces several states and many members, and is, in its turn, subordinate to the American Federation of Labor, which embraces more states and more members. The defendants, by reason of such membership, were enabled to put into operation certain means to accomplish their purpose, and to such means they resorted with vigor and effect. They undertook thereby to compel the plaintiffs, against their will, to unionize their factory. Their associates, with their assistance, had prior thereto employed similar means toward divers factories in other states, and had succeeded. The defendants paraded such successes before the plaintiffs, and a threat to treat them in the same way was one of the means which they employed to coerce the plaintiffs into yielding to their demands. They then withdraw from plaintiffs' employment, and tried with considerable success to prevent others from working for them. With the help of their associates in the larger bodies to which they were affiliated, they declared a boycott upon hats [925] made by plaintiffs which were found in the hands of plaintiffs' customers in other states, notably in California and Virginia. In such action they took advantage of the absence from plaintiffs' hats of the union label, which by the state law of Connecticut the United Hatters were authorized to affix to hats made under the supervision of their

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members. In these ways they caused the plaintiffs a great deal of damage, and (according to the complaint) limited and restrained plaintiffs' interstate trade in hats.

It must be obvious from the foregoing recital that the defendants by the means therein described sought to curtail, and, if possible, destroy, the plaintiffs' production of hats at home, and, with the assistance of their friends, to curtail, and, if possible, destroy, the distribution of such product after it had become settled into the stock of goods in the hands of plaintiffs' customers in other states. There is no allegation which suggests that the means of transporting plaintiffs' product, or the product itself while being transported, were touched, handled, obstructed, or in any manner actually interfered with. There is no allegation that the defendants are in any way engaged in interstate commerce.

The argument for the plaintiffs is that by entering into a scheme to curtail the production at home, and the distribution by customers abroad, the defendants have formed a combination to limit and restrain plaintiffs' trade between the two points, which is interstate trade, and that such restraint is the direct, positive, and inevitable result of the general scheme. The manufacture of the hats before they leave the factory in Danbury is not interstate commerce, nor are the hats themselves up to that time the subject of interstate commerce. The distribution of the hats from the hands of the customers in other states to the ultimate consumer is not interstate commerce, nor are the hats themselves during such distribution the subject of interstate commerce.

The real question is whether a combination which undertakes to interfere simultaneously with both actions is one which directly affects the transportation of the hats from the place of manufacture to the place of sale. It is not perceived that the Supreme Court has as yet so broadened the interpretation of the Sherman act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) that it will fit such an order of facts as this complaint presents. What it may do, if the matter comes up before it, is, in my judgment, very uncertain. If the demurrer, in so far as it attacks the complaint as a whole, shall be overruled and the defendants put to their answer, a jury trial must follow in orderly

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sequence, and after a verdict the end would still be far away. A contested trial might consume weeks of time, and the expense, both to court and parties, would be enormous. It is deemed wise, for these reasons, to sustain the demurrer, and in this situation it is hoped that the court may be pardoned for not entering into an analysis of the contentions put forth by the opposing parties. Such contentions and the independent thoughts which they aroused were necessarily examined with care, in order that this present conclusion could be reached, and if, in making such examination, a further and final conclusion was reached, it would serve no useful purpose to make [926] it known at this juncture. If the matter shall come back to me for further action, observations upon the questions advanced by the special grounds of demurrer would be gratefully read, and might tend to avoid unreasonable delay and expense at a later stage of the proceedings.

Let the complaint be dismissed.

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[939] CONTINENTAL WALL PAPER CO. *v.* LEWIS  
VOIGHT & SONS CO.\*

(Circuit Court of Appeals, Sixth Circuit. January 5, 1906.)

[148 Fed. 939.]

**MONOPOLIES—CONTRACT—RESTRAINT OF TRADE—REASONABLENESS.**

Where a combination of manufacturers and wholesalers of wall papers was claimed to be in restraint of trade and in violation of the congressional anti-trust act of 1890 (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3209]), it was immaterial to the invalidity of the combination that the agreement was valid at common law as imposing only a reasonable restraint on competition, provided the direct result of its operation was to directly restrain freedom of commerce between the states or with foreign nations.<sup>b</sup>

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Monopolies, § 10.

Monopolistic contracts—validity as affected by public policy, see note to Chicago, M. & St. P. Ry. Co. *v.* Wabash, St. L. & P. Ry. Co., 9 C. C. A. 666; Cravens *v.* Carter-Crume Co., 34 C. C. A. 486.]

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\* Judgment affirmed by the Supreme Court (212 U. S. 227). For opinion of the Circuit Court, see *post*, page 61.

<sup>b</sup> Syllabus and statement copyrighted, 1907, by West Publishing Company.

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**[940] SAME—CONTRACT—RESTRAINT OF TRADE—VALIDITY.**—Plaintiff corporation was formed to control the output of 98 per cent of the wall paper mills of the United States, and to this end made contracts with them to buy their entire output at an agreed price. Plaintiff was nominally to make all sales to wholesalers and others, either directly or indirectly, at a uniform price, subject to an agreed scale of discounts, varying according to an arbitrary classification of buyers. The difference between the price at which the manufacturers sold to plaintiff and the price exacted from the buyers from plaintiff constituted the dividends to be distributed to plaintiff's shareholders, who were composed exclusively of those controlling the combining manufacturers; the stock being distributed in proportion to the size of the manufacturer's product the year before plaintiff was formed. The contract provided against the enlargement of the manufacturers' plants, and the only two manufacturers of wall paper machinery in the United States were induced to become parties by agreeing not to sell except to members of the combination. An agreement was also made with Canadian manufacturers to prevent cutting the price. Each member was required to deposit his shares with plaintiff, to be held as security to prevent a breach of the contract. Contracts were then made with jobbers and wholesalers, binding them to buy their entire requirements of plaintiff at specified prices, and not to sell at less than the prices fixed by plaintiff, on pain that if they did not enter into such contracts they could not buy at all. *Held*, that such transaction constituted an illegal combination in restraint of trade and interstate commerce, in violation of Congressional Anti-Trust Act 1890 (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]).

**SAME—ILLEGALITY OF CONTRACT—SALES—ACTION FOR PRICE.**—Plaintiff corporation formed an illegal combination of manufacturers and wholesalers of wall paper in the United States, which constituted a restraint of interstate commerce, and a violation of Congressional Anti-Trust Act 1890 (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). Under the contract between plaintiff and the manufacturers, plaintiff was the nominal seller of all the wall paper manufactured by the combination, though it was actually purchased from various jobbers or mills within the combination. Defendants, wholesalers of wall paper, having been compelled to enter the combination and agree to purchase and sell wall paper in accordance with the monopolistic terms of the contract, purchased paper from various members of the combine, for which plaintiff brought suit. *Held* that, since plaintiff was bound to rely on the combination contract to show its capacity to sue, the illegality thereof constituted a defense to the action.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

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This is an action to recover a balance of \$57,762.10, due on account for wall paper sold and delivered to defendants. The case turned upon the sufficiency of the third defense submitted by the answer to the petition of the plaintiff. To this defense the plaintiff demurred. This demurrer was overruled. The plaintiff declined to plead further, whereupon judgment was rendered for the defendants, dismissing the petition, and taxing the plaintiff with costs. The defense so held to be sufficient was in substance: First. That the plaintiff is a member of an illegal combination among the manufacturers of wall paper, formed for the purpose of enhancing prices, stifling competition, and restraining freedom of commerce between the states and with foreign nations, being such a combination or trust as is forbidden by the anti-trust act of 1890 (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) and by the laws of Ohio. Second. That the defendants were compelled to become parties to the illegal combination, and that the contract upon which this suit depends for price and terms of sale constitutes one of the agreements which go to make up the illegal combination represented by the Continental [941] Wall Paper Company. The answer, embodying the defense here involved, in substance avers: That the National Paper Company, a corporation owning or controlling a large number of wall paper factories situated within the states of New York, Pennsylvania, New Jersey, and Massachusetts, together with a large number of independent firms and corporations engaged in the same manufacture, combined or conspired together for the purpose of controlling the wall paper production in this country by suppressing competition among themselves, and enhancing the price of that article to jobbers, wholesalers, retailers, and consumers. That for this purpose and this end, and to better cover this scheme, they caused the organization under the laws of New York of a corporation known as the Continental Wall Paper Company, with a capital stock of \$200,000, divided into 16,000 shares, the shares to be divided among the conspiring firms and corporations in proportion to the production of each factory during the year preceding July, 1898. That the scheme and agreement was that the



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National Wall Paper Company, as representative of a large number of corporations dominated by it, should select three directors, the other firms and corporations three more, and that the six directors so selected should select a seventh, and the seven directors should direct the combination through the corporate name of the Continental Wall Paper Company. That the plan was that each of the combining concerns should enter into a contract, styling themselves "vendors," with the said company. These contracts to be signed by the several corporations and firms entering into this combination were identical in terms, and were in the following words and figures:

## "EXHIBIT 1.

"This agreement, made this \_\_\_\_\_ day of \_\_\_\_\_, in the year one thousand eight hundred and ninety-eight, by and between \_\_\_\_\_, a corporation organized under the laws of the state of \_\_\_\_\_ (hereinafter called the 'Vendor') party of the first part, and the Continental Wall Paper Company, a corporation organized under the laws of the state of New York (hereinafter called the 'Company'), party of the second part: Whereas, the vendor is engaged in the manufacture and sale of wall paper, borders, and other articles usually produced and handled in connection therewith, and the company is desirous of acting as its selling agent in handling the entire product of the vendor; and whereas, the company has an authorized capital of two hundred thousand dollars, divided into 16,000 shares, of the par value of \$12.50 each; and whereas, the dealer is desirous of acquiring \_\_\_\_\_ shares of the stock of said company at par, and to that end has offered to enter into this agreement and to secure the performance thereof by the deposit of said shares: Now, therefore, in consideration of the foregoing recitals, and for other good and valuable consideration, it is agreed, between the parties hereto as follows:

"First. The vendor hereby sells unto the company, and the latter agrees to purchase, the entire product of wall paper that may be manufactured by the vendor for the period from July 20, 1898, to the first day of July, 1899. The prices at which the merchandise shall be sold to the company are set forth in a schedule hereto annexed marked 'A,' and hereby made a part of this agreement. The vendor further grants unto the company the right to two renewals of said contract of one year each, provided that, in the event of the election of the company to avail itself of either of said renewals, it shall so signify in writing to the vendor before the first day of June next preceding the renewal term, and provided further, that such election to renew shall be accompanied by the written consents of all the registered stockholders of the company, including that of the vendor.

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"Second. The goods acquired by the company from the vendor hereunder, which are to be sold to jobbers, shall be sold by the company, and not by the vendor for the account of the company. Such sale shall be made by the company at discounts from road prices fixed in the schedule hereto annexed marked 'B,' which is hereby made part of this agreement. The vendor will deliver such goods upon the direction of the company at the risk and for the account of the latter f. o. b. at the place of manufacture, provided, however, that in all cases in which the goods are manufactured at places other than the cities of New York or Philadelphia, the vendor will equalize the freights with [942] either of said cities out of the proceeds receivable for such goods. Memorandum invoices shall be supplied to the customer and to the company immediately upon the shipment and delivery of such goods, said invoices specifying quantities and road prices.

"Third. There shall be furnished by the vendor to the company on the 7th, 14th, 21st, and last days of each month (except when those days fall on Sundays, and then on the next succeeding day) a just and true statement of all shipments and deliveries of merchandise included in this contract which the vendor may make for the account of the company, which statement shall contain the names of the purchasers, the character of the goods sold, and the prices at which they were sold, to the end that the company may make the proper charges, and in order to entitle the vendor to be credited with the agreed cost price for such goods. Each of such statements of shipments shall be accompanied by an affidavit of one of the officers of the vendor and of one of its bookkeepers and of one of its shipping clerks, to the effect that the information therein contained is true.

"Fourth. The company shall permit the vendor to sell in its own name, and the latter hereby agrees to sell for the account of the company, such of the goods manufactured by the vendor as are to be disposed of to purchasers not classified as jobbers, which sales shall be made at the cost and expense of the vendor; said vendor hereby guarantying all credits and the collection of all accounts connected with such sales. The prices at which and the terms upon which such goods are to be sold are designated in this agreement as the 'Road prices,' and are contained in a schedule hereto annexed marked 'C,' which is hereby made a part of this agreement. On the 7th, 14th, 21st, and last days of each month (except when those days fall on Sundays, and then on the next succeeding days), the vendor will furnish to the company a statement showing all the shipments made on account of such sales, which statements shall contain the names of the purchasers, the character of the goods, and the prices at which they were sold, and such sales shall be credited to the vendor by the company at the prices fixed in Schedule A, and shall be charged against said vendor at the prices at which they were sold, which shall in no event be less than those designated in Schedule C. The vendor is to receive

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for its services and expenses connected with such sales and allowances discounts equal to those who are designated in a classification made by the parties hereto as 'second class jobbers,' less the discounts made on sales to purchasers designated in the accompanying schedules as 'quantitative purchasers,' on which the vendor has allowed the quantitative discount, except that where special and exclusive goods are sold there shall be an allowance of 30 per cent. discount to the vendor. The prices of goods as fixed by Schedules A and C may be altered from time to time, but the discounts allowed to jobbers shall not be altered at any time during the term of this agreement.

"Fifth. The vendor will make collection of all accounts for goods sold by it for the account of the company under the provisions of this agreement, except for sales to jobbers (which accounts the company is to collect), and will, on the 10th day of each and every month during the term of this agreement account to the company. Such account shall be accompanied by a payment by the vendor to the company of the difference between the prices at which the goods are agreed to be sold to the company as embodied in Schedule A, and the prices at which the vendor has agreed to dispose of said goods as contained in Schedule C. The purchases made by the company from the vendor hereunder shall be upon the same credit and terms as those accorded to other dealers, but the company shall have the right to anticipate the due date of all such purchases, and will pay, on the 10th day of each month, to the vendor a sum on account of all shipments of the preceding month equal to not less than 80 per cent. of the road prices of goods shipped to jobbers by the company.

"Sixth. The vendor hereby grants unto the company the right, and it shall be the duty of the latter, through its officers selected for that purpose, to audit the books of account of the vendor as to production, sales, and shipments at such times and in such manner as the company may, from time to time, deem necessary or proper. This provision is of the essence of the agreement, and a failure on the part of the vendor to faithfully perform the same [948] shall operate as a breach of the contract, entitling the company to abrogate the agreement, and to such damages as it may be able to establish in addition to the absolute transfer and surrender to it of the stock to be pledged as hereinafter provided.

"Seventh. There shall be a committee selected from the company, to be known as the 'Auditing Committee,' which shall be made up from among the directors. Said committee shall have power to establish such a system of bookkeeping as in its judgment may be advisable. In order to conform as nearly as may be to the laws of the various states in which the factories of the vendor are located, it is understood that the vendor shall not be at liberty to require from the company the acceptance of the product of more than ten hours per day of any one of said factories. The product intended to be sold to the company hereunder, and which the latter undertakes to acquire, does not con-

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template the enlargement of the manufacturing facilities of the vendor; but nothing herein contained shall be construed as affecting the right of the vendor to substitute new machinery of the same capacity for any now in use which may become useless through wear or through destruction by fire or other casualty. The power to designate the parties who are to be classed as jobbers, and the discounts to which they are entitled, is expressly reserved by the company, and such designation is to be made through its board of directors; but the vendor shall have the right to select the jobbers through whom the goods manufactured by it are to be distributed, and to designate the amount of its goods such jobbers may buy, subject to such credit limitations as the board of directors may impose. All orders placed with the vendor by jobbers on behalf of the company must be at once reported to the latter.

"Eighth. The company hereby agrees to sell and the vendor agrees to purchase ——— shares of the common stock of the company, for which stock the vendor agrees to pay the sum of ——— in cash as soon after the execution and delivery of this agreement as the same may be demanded by the company; but only if and when the entire share capital of the company shall have been fully subscribed at not less than par. The vendor will, after paying for said shares of stock, indorse the certificates representing the same, and deliver the certificates so indorsed in blank to the company, upon the trust and agreement that the company shall hold said certificates as security for the performance by the vendor of each and all of the covenants and conditions of this agreement; and upon the refusal, neglect, or omission of the vendor, its successors or assigns, to perform this agreement, or any part thereof, the said shares of stock and the certificates represented thereby shall be immediately sold by the company at public or private sale, without notice, upon such terms and at such price as the company or its officers may deem reasonable, and that the proceeds of sale be paid into the treasury of the company as the agreed and liquidated damages to the company for the breach of said agreement. The parties hereto have fixed upon the said stock and the proceeds thereof as liquidated damages, because of the difficulty in establishing, in a court of law, the actual damage that would be suffered by the company in the event of the refusal, neglect, or omission to perform this agreement, and in order to avoid the difficulty of such proof.

"In witness whereof, the vendor and the company have respectively caused this agreement to be executed by their respective presidents, and their respective corporate seals to be hereto attached, pursuant to resolutions of their respective boards of directors, the day and year first above written."

It would unduly lengthen this statement to fully set out the schedules referred to in the above exhibit, and made a part of the contract between the so-called vendors and the company. The answer then avers that the prices to be charged the company for the product of

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each so-called vendor was the estimated cost of production and incidental expense to such manufacturer of carrying out his or its part of the contract. Schedule A of the contract sets out the "list price" of all qualities of paper, and in a parallel column the sale price to the company. Schedule B sets out the sale price by the company to the several classes of jobbers which the company binds itself to exact, and the terms of sale. The gross sale price in this schedule is the list price of Schedule A, with a discount, which depends upon the classification of jobbers [944] provided for by the seventh clause of the contract. Schedule C sets out the sale price to purchasers "other than jobbers" and terms of sale, these prices being also designated as "road prices." These prices are the "list prices" of Schedules A and B, with no discount. To purchasers described as "other than jobbers" certain discounts are provided, dependent upon quantity. Under clause 7 of the contract, set out above, "the company," acting through its directors, selected in the manner heretofore mentioned, is given authority to classify jobbers, and prescribe the discount to each class; each "vendor" being allowed "to select the jobbers through whom the goods manufactured by it are to be distributed, and to designate the amount of its goods such jobbers may buy."

"The distribution of profit over cost to the company may be illustrated by taking two classes of wall paper, one a cheap kind and the other more expensive. Thus the list price of wall paper styled "Brown" is 4 cents per bolt; the sale price to the company 2 cents. The price by the company to "jobbers" in the first class is 4 cents, with a discount of 20 per cent., to "jobbers" in the second class, 4 cents, with a discount of 17½ per cent., to "jobbers" in the third class, 4 cents, with a discount of 15 per cent. The selling price to all purchasers other than those classified as jobbers is fixed at 4 cents flat, unless a discount of small proportions is obtained as a result of a purchase bringing the buyer within the terms of those called "quantity purchasers." "Embossed Bronzes" of one class are listed 18 cents per bolt; jobbers being allowed a discount of 45 per cent., 40 per cent., or 30 per cent., according to the class they have been placed in. All the schedules contain a provision for the equalization of freights with certain cities, thus eliminating advantages due to locality. It is further averred in said defense that the companies, corporations, and firms which organized said company, and which subsequently subscribed for stock and signed one of the agreements like that heretofore set forth, constituted 98 per cent. of all the manufacturers of wall paper in this country. It is further stated that, for better carrying out of the said combination, agreements were made by the plaintiff with parties, companies, and corporations within the United States and Canada, "by which each agreed not to compete with the other nor cut prices, the Americans in Canada and the Canadians in the United States." It is also alleged that to further carry out the purpose to prevent competition and enhance prices, that a

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contract was made between plaintiff and John Waldren & Son and the Kaukauna Machine Company, the only two manufacturers of wall paper machinery in the United States, one having a manufactory in New Brunswick, New Jersey, and the other a manufactory in Kaukauna, Wisconsin, by which said manufacturers agreed, during the existence of the plaintiff, to sell wall paper machinery only to it and said combination, and not to any mills preparing to start. It is then averred that all wholesale dealers in the United States were arbitrarily divided into two classes—jobbers and “road” or “quantity buyers”—and that the jobbers were arbitrarily divided into the three classes heretofore mentioned, and the other wholesalers into “road” or “quantity buyers” and “special buyers,” with the purpose that all should then be compelled to sign written agreements obligating themselves to buy their entire stock of merchandise from the plaintiff direct, or through members of the combination, and to this end identical printed agreements were presented to all jobbers and wholesalers throughout the United States and the territories, by which each obligated itself to buy their entire purchases of wall paper from said plaintiff at list prices of Schedule A, heretofore set out, subject to discounts shown by schedule accompanying each such agreement, and binding each such jobber or wholesaler not to sell at prices lower or better than those shown by another schedule accompanying each such agreement. A copy of the agreement, so required to be signed by each jobber and wholesaler, is made a part of the answer as “Exhibit 2.” Same is here set out below.

“EXHIBIT 2.

“An agreement made this ——— day of ———, in the year one thousand eight hundred and ninety-eight, between the Continental Wall Paper Company, a corporation organized under the laws of the state of New York (hereinafter called the ‘Company’), party of the first part and ——— of ——— (here[945]inafter called the ‘Jobber’) party of the second part. In consideration of the sum of one dollar, paid by the jobber unto the company for the granting of this agreement, the receipt whereof is hereby acknowledged, and other valuable considerations, it is agreed, between the parties hereto as follows: First, That the company will sell, subject to such credit limitations as it may impose, and the jobber will purchase, the entire requirements of the jobber in his business of selling wall paper for the business year ending July 1, 1899, to the amount of a gross value, without discounts, of ———, the jobber reserving to himself the right to purchase such merchandise as he may need in excess of ——— from others. The company is to deliver the goods without additional charge f. o. b. at New York or Philadelphia, or to equalize freights from the places at which it makes deliveries to either of said cities. Second. The jobber shall be allowed discounts at the rates shown in

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the accompanying schedule marked 'A,' which is hereby embodied in this agreement as a part thereof. The terms of payment to be as follows: Four months from the date of invoice, with discount at the rate of 1 per cent. per month for anticipated payment; provided settlement be made within 30 days from date of shipment either by cash or note. Invoices for all goods shipped between October 15th and March 1st to take the latter date. Third. Attached hereto marked 'B' is a schedule of the road prices at which the company sells its goods for the term embraced in this contract to dealers other than jobbers, and also a statement of discounts allowed to such customers other than jobbers for quantity purchasers, together with the terms of credit and freight allowance to which such customers are entitled. It is an essential condition of this agreement that the jobber will not directly or indirectly sell or offer for sale any of the merchandise purchased from the company hereunder at lower prices or upon better or more favorable terms than those shown in Schedule B; the intent hereof being to assure the company against the use by the jobbers of this agreement to undersell the company. The prompt performance by the jobber of the provisions of this agreement as to payment and otherwise is a condition precedent to exacting the continuous performance of said agreement by the company.

"In witness whereof the company has caused this instrument to be executed, and the jobber has hereunto set his hand the day and year first above written.

"\_\_\_\_\_  
"\_\_\_\_\_"

Schedule A of the above agreement is identical with Schedule B of the agreement between "vendors and the company," heretofore set out, and Schedule B, attached to and made a part of Exhibit 2, above set out in full, is same as Schedule C attached to Exhibit 1, heretofore set out.

It is charged that "the immediate, intended, and direct effect of said combination and agreements was the stifling of competition between said manufacturers and vendors of wall paper and between jobbers and wholesalers thereof, and to unduly enhance the price of wall paper, making it one-half more than the price which it would be if same had been left to free and unrestricted competition." It is further distinctly averred that by these agreements and contracts aforesaid the entire wall paper trade throughout the United States passed into the hands of the plaintiff company, and that it "threatened defendant that, unless it signed said agreement (Exhibit 2, set out above), no wall paper would be sold to it. That said combination would make it impossible for it to buy wall paper or to continue its business, and would drive it out of its said business, and compel it to sacrifice the good will owned by it, as aforesaid, and the capital invested by it in said business." It is further averred that the defendant conducted for many years a large business in wall paper

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at Cincinnati, selling to retailers and consumers in Ohio and other states of the Union. That the defendant, finding it impossible to continue business without signing said agreement shown in Exhibit 2, did sign and become a member of said combination. The defendant charges that, under the contract so signed by him, he purchased more than \$200,000 worth of wall paper, and that the prices he was compelled to pay were extortionate and unreasonable, and more than 50 per cent. greater than they would [946] have been had competition between wall paper makers not been completely suppressed by the agreements between such manufacturers and said corporation.

*Lewis Marshall*, for plaintiff in error.

*Orris P. Cobb* and *Morrison R. Waite*, for defendant in error.

Before LURTON and SEVERENS, Circuit Judges, and COCHRAN, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

It has been urged that the defense to the claim in suit must fail upon either of two grounds: First, that the contract between the plaintiff corporation and the manufacturers of wall paper does not contain any stipulations beyond those admissible and essential to protect the contracting parties in securing reasonable prices and against unreasonable and demoralizing competition; second, that if it be conceded that the agreement does constitute an unlawful combination in restraint of interstate trade and commerce, that that fact affords no defense to a suit for the price of goods sold and delivered to the defendant. These in their order.

As to the first point, it need only be said that the legality of the contract between the combining companies at common law, as imposing only a reasonable restraint upon the freedom of competition, is not a defense if the dominant purpose of the agreement and the direct result of its operation is to directly, and not incidentally, restrain freedom of commerce between the states or with foreign nations. Until the Supreme Court shall otherwise hold, we feel concluded by the meaning placed upon the act by *United States v. Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *United States v. Joint Traffic Association*, 171 U. S. 505, 19



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Sup. Ct. 25, 43 L. Ed. 259; *Chesapeake & O. Fuel Company v. United States*, 115 Fed. 610, 53 C. C. A. 256; and not departed from in *Northern Securities Company v. United States*, 193 U. S. 197, 331, 24 Sup. Ct. 436, 48 L. Ed. 679. But we think the combination and agreement shown by Exhibit 1 comes within the prohibition of the act of Congress, whether that act be aimed only at unreasonable restraints or not. That contract and agreement is one between 98 per cent. of all the wall paper makers in the United States, who cooperate through a corporation organized by them for the single purpose of selling their gross product. That there shall be no competition between the combined companies is insured by the agreement that each manufacturer shall sell his entire product at an agreed price to the plaintiff corporation, which is to nominally make all sales, either directly or indirectly, at a uniform price, subject to an agreed scale of discounts, varying only according to an arbitrary classification of buyers. The difference between the price at which the so-called "vendors" sell to the plaintiff company and the price exacted from those who buy from it will be profit, and the profits will constitute the dividends to be distributed to plaintiff's shareholders, and plaintiff's shareholders are exclusively composed of the combining companies, called "vendors"; its comparatively insignificant amount of stock being placed with these vendors in proportion to the product of the year before the combine took effect. To prevent the enlargement of the product of any one of the vendors, it is provided, in effect, that there shall be no enlargement of plant, though new machinery may be used to replace old or that destroyed.

To insure a monopoly of the business to themselves, and keep strangers out of it, it is alleged, and not denied, that the only two manufacturers of wall paper machinery in the United States became parties to the combination by agreeing to sell no machinery to strangers, and to confine their sales to the combine. To add to the protective force of the tariff duties tending to keep out foreign products, it is also averred that an agreement was made with Canadian paper makers to protect each other against any cutting of prices. To

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insure against any kicking out of the agreement or violations in any way, each member is required to indorse its shares in the Continental Wall Paper Company to that corporation, which is to hold and apply the same as liquidated damages in case of any breach. But that there should be no inducement to fly the contract, the scheme contemplated that every wholesale buyer should engage himself to buy his entire supply from the combine; and to secure the engagement of each such jobber or wholesaler to the scheme, no paper was to be sold to such as did not sign. This made the contract practically unbreakable, for if a factory should weary of the monopoly, it could find no jobbers or wholesalers free to buy its product, and it would be driven to rely upon such orders as it could get from retailers or consumers. That this union of former competitors—a union embracing substantially all of the wall paper mills in the land (for the 2 per cent left out may be ignored as an active competition), should result in an unreasonable enhancement of prices is precisely what we might anticipate. Wall paper is a product of universal necessity, and the consumers are found in every household. Every principle of economic law instructs us that under such conditions there will be an enhancement of price, limited only by the unknown boundary of human greed and corporate avarice. It is therefore not to be doubted that the averment confessed by the pleading, that prices have been advanced 50 per cent, is substantially true. The conspiring mills were situated in many states. The consumers embraced the whole citizenship of the United States. The jobbers and wholesalers who were to be coerced into contracts to buy their entire demands from the Continental Wall Paper Company, or be driven out of business, were in every state.

Before the combination, each of the combining companies was engaged in both state and interstate commerce. The freedom of each, with respect to prices and terms, was restrained by the agreement and interstate commerce directly affected thereby, as well as by the enhancement of prices which resulted. A more complete monopoly in an article of universal use has probably never been brought about. It may be that the wit of man may yet devise a more complete

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scheme to accomplish the stifling of competition; but none of the shifts resorted to for suppressing freedom of commerce and securing undue prices, shown by the reported cases, is half so complete in its details. None of the schemes with which this may be compared is more certain in results, more widespread in its operation, and more evil in its purposes. It must fall within the definition of a "restraint of trade," whether we confine ourselves to the common-law interpretation of that term, or apply that given to the term as used in the federal act by the cases we have cited above.

This brings us to the vital question in the case, which is the bearing of the fact that the plaintiff is but the corporate hand of an illegal combination under the anti-trust law of 1890 upon the liability of the defendants in this action for the price of wall paper bought from the illegal combine. The contention is that the contract upon which the action is brought is wholly collateral to any contract between the plaintiff and the other members of the illegal combination. But if the contract to pay for the goods included in the account sued upon is only part of an entire agreement, which includes stipulations which are illegal, the case of the plaintiff must fail. It is elementary law that the courts will not lend assistance in any way in carrying out an illegal agreement. *McMullen v. Hoffman*, 174 U. S. 639, 654, 19 Sup. Ct. 839, 43 L. Ed. 1117; *Embrey v. Jenison*, 131 U. S. 336, 348, 9 Sup. Ct. 776, 33 L. Ed. 172. Nor can a plaintiff show only such part of an entire agreement as is legal, and sue upon that alone. The whole must come. See cases just cited. If the combination had stopped with the agreement between the manufacturers and the plaintiff, by which the competition between the makers of wall paper had been obviated and a uniform sale price settled, this fact would have been no defense for the price of goods sold by the illegal combination to a stranger. If the defendants had been injured in their business by such an illegal method of enhancing prices, their only remedy would have been a direct action for damages, under section 7 of the anti-trust act (28 Stat. 210 [U. S. Comp. St. 1901, p. 3202]). *Montague & Co. v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608; *City of Atlanta v.*

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*Chattanooga Foundry & Pipe Works Co.*, 127 Fed. 23, 61 C. C. A. 387; and *Connolly v. Union Sewer Pipe Company*, 184 U. S. 540, 551, 552, 22 Sup. Ct. 431, 46 L. Ed. 679. If the illegal agreement in restraint of trade had included only a contract between the manufacturers themselves, the defendants and all other jobbers would at least have had the privilege of buying from whom they could best get that which they wanted, and the liberty of selling to whomsoever and at such prices as they saw fit. Competition between themselves in buying and selling would be free except in so far as the market was monopolized by the combine between manufacturers. But this might have resulted in conditions threatening to the permanency of the manufacturers' monopoly by offering a strong inducement for strangers to enter the field with new plants, and to those within the fold to break away. These considerations doubtless led to such an extension of the agreement or combination, as to take in the jobbers and wholesalers. This was easy to do, for the threat to refuse to sell to such as would not come in would inevitably bring them to an agreement. And so the defense avers that the plan and agreement of the manufacturers, who organized the plaintiff as an instrumentality through which competition between themselves might be stifled, included the bringing into the combination all the [949] jobbers and wholesalers in the United States by identical agreements with each such dealer and the plaintiff, whereby the contracting jobbers should agree to buy exclusively from the plaintiff or other members of the combine, and to sell only according to a schedule of prices and terms of credit dictated by the plaintiff. It is also averred and admitted by the demurrer that this purpose was carried out, and identical agreements obtained with all jobbers and wholesalers. The form of all such contracts with jobbers has been set out as Exhibit 2 in the statement of this case. Under threat that they must sign this jobbers' agreement or be driven out of business, the defendants signed, and this is an action for goods sold upon the terms and prices settled by that contract. That contract provides, among other things, that the jobbers shall deal only with the plaintiff. The form in which this agreement is stated is to buy

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his demand up to a certain sum inserted by the plaintiff, and only the excess over that from other sources of supply. But that form of putting the agreement is but a shallow blind. The amount inserted to fill the blank is, as averred, always twice as much, or more, than the gross purchases of the preceding year. This leaves no probability of any demand over the sum inserted. With reference to the jobber's liberty of sale, it is provided:

"Third. Attached hereto marked 'B' is a schedule of the road prices at which the company sells its goods for the term embraced in this contract to dealers other than jobbers, and also a statement of discounts allowed to such customers other than jobbers for quantity purchases, together with the terms of credit and freight allowance to which such customers are entitled. It is an essential condition of this agreement that the jobber will not directly or indirectly sell or offer for sale any of the merchandise purchased from the company hereunder at lower prices or upon better or more favorable terms than those shown in Schedule B; the intent hereof being to assure the company against the use by the jobbers of this agreement to undersell the company. The prompt performance by the jobber of the provisions of this agreement as to payment and otherwise is a condition precedent to exacting the continuous performance of said agreement by the company."

Schedules A and B, referred to in the jobbers' agreement, are Schedules B and C of the manufacturers' agreement. But the essential entirety of agreement between the so-called vendors and the plaintiff and that between the plaintiff and the defendants and all other jobbers, and the necessity the plaintiff is under to found its right of action upon the entire agreement, is illustrated by the company's attitude as plaintiff. It does not make a roll of paper. The mill-owners continued to operate their respective mills, and to take and fill orders after as before the combine. But by Exhibit 1 all sales to "jobbers" were to be in the name and on account of the plaintiff, and the price collected by the plaintiff. As the contract suggestively puts it, "*the vendor shall have the right to select the jobbers through whom the goods manufactured by it are to be distributed, and to designate the amount of its goods such jobbers may buy.*" Thus the petition or declaration in this case is upon an account which shows purchases by the defendants from many different members of the com-

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bine, and the amount bought from each. But the plaintiff sues for the aggregate balance due upon the several purchases. This action it seeks to maintain, not upon any averment of an assignment [950] by the several vendors to it, but as upon an account with it and not the vendors. These and other considerations lead us to the conclusion that the several agreements we have referred to constitute one whole, and that the general purpose and design and the undoubted result is to establish an illegal combination of manufacturers and wholesale dealers in restraint of trade—state and interstate.

The jobbers who have signed the particular contract essential to secure their co-operation are, in a sense, victims, for they have been coerced into agreement. Nevertheless, they are also members of the illegal combination, and active participants in the scheme for the illegal enhancement of prices, the stifling of competition, and the restraint of freedom of trade and commerce. The jobbers do not share in the benefits which result to the manufacturers from the stifling of competition between themselves and the enhancement of prices thereby resulting. By that the jobbers are victimized. But the jobbers do share in the benefits growing out of the destruction of competition in prices as between themselves. The enhanced prices which they pay are exacted again from retailers. The consumer, at last, is the only real victim. It is the consumer who makes up the public, which it is the object of the law to protect against undue exactions through illegal combinations in restraint of freedom of commerce and fair play in commercial transactions.

The defense which we sustain here is not for the sake of William Voight & Sons. The averment that they paid 50 per cent. more for their gross purchases in consequence of the illegal combination has little merit in it, moral or otherwise. They doubtless sold again at the great minimum profit they agreed to exact from retailers, and the retailers later exacted the undue profit from the consuming public. There, at last, like all burdens, it must rest. The defense here sustained is good only because it is only possible to protect the public by refusing all assistance in carrying out an illegal agreement.

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This is the policy of our law, and to maintain this policy the judgment of the Circuit Court must be affirmed.

**NOTE.**—Following will be found the opinion of the court below, submitted on demurrer to the second, third, fourth, and fifth defenses of the answer:

"The demurrer can not be sustained to the second defense. The plaintiff is a corporation duly organized, and the transaction in question was between it and the defendant. If the transaction be lawful, then any cause of action arising out of it against the defendant is vested in the plaintiff, and no one else can sue upon it. If it be unlawful, recovery will be denied, not because the plaintiff is not the real party in interest, but because the policy of the law will not permit a recovery. If there be a right of action at law, it is, upon the defendant's own showing, vested in the plaintiff.

"In the third defense it is shown that the defendant for many years prior to the bringing of this suit was a jobber in buying and selling wall paper in Ohio and other states and territories of the United States; that certain persons, firms, and corporations, 36 in number, engaged in the manufacture of wall paper, their product being upwards of 98 per cent. of all the wall paper manufactured and sold in the United States, conspiring to form a combination by which to limit the production of wall paper in the United States, and to enhance the prices thereof to jobbers, wholesalers, retailers, and consumers, and to restrain trade and commerce between the several states and territories of the United States and with foreign nations, 'agreed with each [961] other that, while said corporations and persons should retain ownership of their said plants and business, and preserve and continue their several identities, and operate said manufactories and businesses as before, the control of said businesses, and all matter relating to and effecting the production of said establishments and the price and sale of all wall paper manufactured thereby, should be under the control of a committee to be appointed by said several corporations and firms, each to have a voice in such appointment in proportion to the capacity of the several factories owned by them, respectively; that such committee should adopt rules and regulations governing the manner of conducting the business of said firms and corporations, the hours said factories owned by them should be operated, the patterns of wall paper to be manufactured by them, the times when samples of the goods to be manufactured for the ensuing season should be submitted to a pricing committee appointed by said committee, to enable it to classify and fix the list prices thereof, to fix and determine list prices, discounts, terms of sale, equalization of freight rates, and all other matters affecting the production and regulation of prices, and the classification of the dealers in wall paper in the United States, and the prices at which wall paper should be sold to and by such several classes, and the division of the profits arising among said

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several corporations and firms, not in proportion to their production and sales, but in proportion to their capacity; and, further, that, to secure the faithful performance by each of said persons and corporations of the provisions of said trust agreement, they should each pay a sum into a common pool, in proportion to the capacity of their respective manufactories, which said sum should be forfeited by any of such said manufacturers who should break said agreement, competing with the other parties to said agreement, or sell at other or different prices than those to be fixed by said committee.' And to defeat and evade the law it was further agreed that: 'For the more effectual carrying out of said scheme, a corporation should be ostensibly formed under the laws of the state of New York, to be called the "Continental Wall Paper Company," being the plaintiff herein, with a capital stock of \$200,000, to be divided into 16,000 shares of the par value of \$12.50 each, said stock to be divided among said corporations and firms in proportion to the number of rolls of paper manufactured by them in the year preceding said month of July, A. D. 1898.' That seven directors of said Continental Wall Paper Company should be selected by the members of the combination. That said corporations and firms each and the Continental Wall Paper Company should sign a printed contract, a copy of which is attached to the answer as Exhibit 1, in which the manufacturer is designated as the vendor and the plaintiff as the company, and which provides, among other things, in substance, that the company shall act as selling agent in handling the entire product of the vendor at the prices set forth in Schedules A, B, and C of Exhibit 1. That there shall be no enlargement of the manufacturing facilities of the vendor, but that new machinery may be substituted for old which may become useless. It also provides for the classification of the purchasers of wall paper. And it was further agreed that the Continental Wall Paper Company should require all dealers in wall paper, whether jobbers or wholesalers, to sign an agreement, a copy of which is attached to the answer as Exhibit 2, which, among other things, provides: 'First. That the company will sell, subject to such limitations as it may impose, and the jobber will purchase, the entire requirements of the jobber in his business of selling wall paper for the business year ending July 1, 1899, to the amount of a gross valuation, without discounts, of ———, the jobber reserving to himself the right to purchase such merchandise as he may need in excess of ——— from others. \* \* \* Second. The jobber shall be allowed discounts at the rate shown in the accompanying schedule, marked "A," which is hereby embodied in this agreement as a part thereof. Third. Attached hereto marked "B" is a schedule of the road prices at which the company sells its goods for the term embraced in this contract to dealers other than jobbers, and also a statement of discounts allowed to such customers other than jobbers for quantity purchases, together with the terms of credit



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and freight allowance to which such customers are entitled. It is an essential [952] condition of this agreement that the jobber will not, directly or indirectly, sell or offer for sale any of the merchandise purchased from the company hereunder at lower prices or upon better or more favorable terms than those shown in Schedule B the intent hereof being to assure the company against the use by the jobber of this agreement to undersell the company.' And in the event of the refusal of any wholesaler to sign such agreement, no paper should be sold to him, and he should be driven out of business. It is further shown that 'to conceal the fact that it (Exhibit No. 2) was an agreement to purchase from no one but said company and the members of said combination and trust, the amount of purchases made by the buyer in the previous year from all the members of said combination and trust, being the entire amount of purchases made by such buyer during the preceding year, was ascertained, and an amount at least double thereof, being an amount supposed to be, and which was in fact, more than, by any possibility, could be needed by such buyer, was inserted in said blanks as the amount to be purchased by such buyer from the company.' And it is further shown that 'at the time of the formation of said combination and trust John Waldron & Son and the Kaukauna Machine Company were the only manufacturers in the United States of wall paper manufacturing machinery in the United States, having their factories, one in New Brunswick, N. J., and the other in Kaukauna, Wis., and were engaged in manufacturing wall paper machinery in said states. \* \* \* In further carrying out of said combination and trust, \* \* \* agreements were made between said manufacturers of machinery and said plaintiff, by which, for a certain consideration, said manufacturers of machinery agreed, during the existence of plaintiff, to sell wall paper manufacturing machinery only to it and the members of said combination, and not to any new mills desiring to start.' And it is further shown that 'the members of said combination and trust, the said plaintiff, further to carry out said agreement, compelled all the other wholesale and quantity buyers to sign agreements, in the form attached to this answer, marked "Exhibit 3," the same being a printed form with blanks for signatures, and having attached thereto the prices shown as Schedule C, attached to Exhibit 1, which are the list prices referred to in said agreement.' And it is further shown that the combination had the power and the will to prevent the defendant from obtaining wall paper for its trade, and to drive it out of business, and it was compelled to, and did, sign the agreement attached to the answer as Exhibit 2, and in carrying out said scheme and combination did purchase from the plaintiff, and the plaintiff did deliver to the defendant, 'in the year from September, 1898, to September, 1899, wall paper, of which this defendant paid to said plaintiff for and per direction of the members of said combination the sum of \$144,854.14,' as shown by the state-

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ment of account attached to the petition. That the prices charged in the exhibit attached to the amended petition are the prices fixed and determined in pursuance of and by the combination or trust agreement, and at least one-half more than they would otherwise have been, and that the wall paper was purchased by the defendant and delivered by the plaintiff in pursuance of said combination or trust agreement, and that this suit is an attempt to enforce and recover the prices so fixed by said combination.

"In short, this defense shows a combination of manufacturers of wall paper, of manufacturers of wall paper machinery, and of jobbers and wholesalers of wall paper, with power to control the production and sale of all wall paper machinery and 98 per cent. of all wall paper manufactured in the United States, and that in the exercise of this power it limited production, prevented competition, fixed and enhanced the prices of wall paper, and compelled the jobbers and wholesalers throughout the United States to buy and sell to retailers and consumers at the prices so fixed, and that this action is founded on an account for wall paper sold to the defendant as one of the members of the combination, by the plaintiff as the agent and trustee of the combination, at the prices so fixed by the combination, and in furtherance of the purposes of its organization. Assuming, for the purpose of the demurrer, that the allegations of this defense are true, it follows that the combination was illegal and unlawful, within the meaning of the anti-trust laws of Ohio and [953] of the United States. The present case differs from the *Connolly Case*, 184 U. S. 540-549, 22 Sup. Ct. 431, 46 L. Ed. 679, in this: that the purchases by the defendant had direct and necessary connection with the illegal combination. The defendant was not an outsider, purchasing goods of the plaintiff in the usual and ordinary course of business, but a member of the combination, who purchased the goods from the combination through its representative and agent, upon the terms prescribed by the combination, and in furtherance of its purposes. The demurrer to this defense, therefore, is not well taken, and will be overruled.

"Under the fourth and fifth defenses, the defendant seeks to recover by way of cross-petition under the anti-trust laws of Ohio and of the United States, as damages, double and treble the moneys paid by it to the plaintiff for wall paper, as shown by the exhibits attached to the petition and the amendment thereto. The demurrer to these defenses is well taken, and will be sustained. It is not admitted to these defenses that the defendant was a party to the illegal combination, but the defendant is bound by the admission of the third defense. It will not be permitted to admit for the purposes of the third defense a fact pertinent to the transaction under investigation."

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## [21] JAYNE ET AL. v. LODER.

(Circuit Court of Appeals, Third Circuit. December 8, 1906.)

[149 Fed., 21.]

**NEW TRIAL—GROUNDS—SUBMISSION OF INCOMPETENT EVIDENCE OF DAMAGES—REMISSION OF EXCESS OF RECOVERY.**—Where a plaintiff's claim for damages for a tort was submitted to the jury on incompetent evidence as to certain of the items claimed, and a verdict was returned for plaintiff for less than the total amount claimed, the error cannot be rectified by requiring a remittitur of the amount of the items so erroneously submitted, since the court cannot know whether, or to what extent, such items entered into the verdict, and the only remedy is by the granting of a new trial.\*

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 323.]

**MONOPOLIES—SHEEMAN ANTI-TRUST ACT—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE—MANUFACTURERS OF PROPRIETARY MEDICINES.**—The manufacturer of a proprietary medicine may sell or withhold from selling as he pleases, fixing the prices, and naming the terms at and upon which alone he will do so, and refusing to sell to those who will not comply, and, so far as this is confined to his own goods, and pursued by independent and individual action, it is within his rights; but when two or more combine and agree that neither will sell to any one who cuts the prices of any of the others, this concerted policy, by which it is sought, not only to maintain by each the price of his own medicine, which alone he is interested in or has the right to control, but also the prices on those of all who are thus banded together, is a direct interference with and restraint upon the freedom of trade, and when it affects interstate commerce is clearly a combination and conspiracy in restraint of such trade, in violation of the anti-trust law of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Monopolies, § 13.]

**SAME—COMBINATION OF ASSOCIATIONS IN DRUG TRADE.**—Three national associations of persons interested in the drug trade—the Proprietors' Association of America, composed of manufacturers of proprietary medicines, the National Wholesale Druggists' Association, and the National Association of Retail Druggists—joined in the adoption of a so-called "tripartite agreement," the purpose of which was to

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maintain the retail prices of patent or proprietary medicines, and which provided that wholesalers should refrain from selling such medicines at any price to "aggressive cutters" of prices or brokers; an aggressive cutter being defined as a dealer who was so designated by 75 per cent of the local trade at any given place. Pursuant to such concerted plan, to which all were bound and to carry it into effect, proprietors thereafter sold only at fixed and uniform prices to those wholesalers who agreed to maintain prices, and not to sell to aggressive cutters or brokers, in accordance with a list furnished by a committee of the wholesalers' association, while the list of aggressive cutters was furnished by the secretary of the retailers' association. If a wholesaler violated such agreement, and sold to an aggressive cutter, he was at once reported, and his name added to that list, and notice of the fact sent to all retailers who were members, with a suggestion that they act for the protection of their interest. If he was reinstated, a second notice of that fact was sent. *Held*, that such concerted plan and action constituted a combination and conspiracy in restraint of interstate commerce, in violation of the anti-trust law of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Monopolies, § 13.]

[22] SAME—ACTION FOR DAMAGES—JOINDER OF MEMBERS OF SEPARATE COMBINATIONS.—National associations of manufacturers of proprietary medicines, wholesale druggists and retail druggists, respectively, entered into a tripartite agreement for the purpose of maintaining prices of proprietary medicines, which constituted a combination and conspiracy in restraint of interstate commerce, in violation of the anti-trust law of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), and adopted definite plans and methods for carrying it into effect by preventing retailers who cut prices from obtaining such medicines. Subsequently, to forward the same general purpose, the retailers' association proposed further plans and methods far more drastic, under which such price cutters were prevented from obtaining any druggists' supplies. These plans were not adopted by the other associations, but were assented to by some of their members individually upon direct appeal but not by others. *Held*, that the two combinations were separate and distinct, and that a party to the first, who did not become a party to the second, was not bound thereby, and could not be joined as a defendant in an action for damages under the statute with other defendants, who were parties only to the second agreement, nor was the latter admissible in evidence against him.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

## Opinion of the Court.

For opinion below, see 142 Fed. 1010.

*W. Horace Hepburn, Irving P. Wanger, and John G. Johnson*, for plaintiffs in error.

*Henry J. Scott*, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and ARCHIBALD, District Judge.

ARCHIBALD, District Judge.

This case was an involved and tedious one, and the reluctance of counsel to retry it is not to be wondered at. The suggestion at bar, however, that there should be no reversal unless it could be without a venire, was not put in shape to be acted upon; and as material error has been assigned which cannot be passed by, notwithstanding the painstaking care with which the case was considered and the correctness with which, in the main, it was disposed of, it must nevertheless go back and be tried over.

The error which lies on the surface is the attempt of the court, by a reduction of the verdict, to eliminate items of damage with regard to which there was admittedly no sufficient evidence. The damages claimed by the plaintiff were \$34,416.72, made up as follows: Compensation for extra time and labor, covering a period of 4 years, \$20,000; 8 per cent. increased cost on \$96,000 worth of proprietary medicines purchased, \$7,680; extra clerk hire for 4 years, \$4,000; interest for 4 years on \$10,000 increased capital required, \$2,700; loss of profits on sales in June and July, 1904, \$36.72. The jury gave a verdict somewhat less than this, for \$20,738, which the court, on a rule for a new trial, still further reduced to \$10,880.52, to which extent alone it was figured there was evidence to sustain it. *Loder v. Jayne* (C. C.) 142 Fed. 1010. It is not necessary to follow the steps by which this result was reached, or the reasoning by which it was sought to be justified. It is sufficient to note that the evidence with regard to the first and fourth items of claim was held to be insufficient, and that the item of clerk hire [28] was found to be substantiated to the amount of but \$3,164. Putting this

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and the remaining two items together, the verdict was allowed to stand for the aggregate; all above that being required to be released.

The error which was so committed is manifest. The admission of incompetent evidence could not be cured in any such way. The verdict rendered is based on the whole of it, good and bad, and there is no means of knowing by what items the jury were influenced, or how far the items which are now allowed were accepted by them, or entered into their calculations. As it stands, the verdict is judge made; the only virtue in it being that it is within the amount assessed by the jury. But that coincidence does not help it, the amount so found being the result of evidence improperly submitted for their consideration, the only remedy for which was to grant a new trial. *Jacoby v. Johnson*, 120 Fed. 487, 56 C. C. A. 637. See, also, *Watt v. Watt*, L. R. App. Cases (1905) 115.

More important, however, is the question which is raised, whether the defendants are in any respect liable. The action is for damages, under the act of Congress of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), commonly known as the "Sherman Anti-Trust Law," the defendants being charged with having entered into an unlawful combination injurious to the plaintiff, within its terms. The sections which obtain are given in the margin.<sup>1</sup> The drug trade is the one affected; the plaintiff being a retail dealer doing business in Philadelphia, and the defendants variously engaged as wholesale or retail druggists or manufacturers of patent medicines and pharmaceutical supplies. The plaintiff

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<sup>1</sup> "SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade, or commerce among the several states or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in such combination or conspiracy shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding five thousand dollars or by imprisonment not exceeding one year or by both said punishments, in the discretion of the court.

"SEC. 2. Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several

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is the subject of trade animosity because he does not maintain the price of medicines, as the defendants think he ought to, and as they have agreed among themselves that they shall be. He is what is known as an "aggressive cutter," against whom and others similarly actuated the acts complained of are directed.

That which is charged to be a combination in violation of the act consists primarily in what is known as the "Tripartite Plan," so called [24] because of its being entered into by the three affiliated associations in the drug trade—the Proprietary Association of America, the National Wholesale Druggists' Association, and the National Association of Retail Druggists—of one or the other of which the defendants are members. The purpose was to maintain the retail prices of patent or proprietary medicines by combined action, which was recognized as necessary to accomplish it. These medicines, being compounded according to secret formulas by those who originate them, are made popular by extensive advertising, and are supposed to be retailed to the consumer at uniform prices, fixed by the proprietors and named on the package. In some parts of the country this is carried out, but in others, particularly in the large cities, where competition is keen, there has for a long time been a cutting of prices by the retailer, which has reacted on the jobber or wholesaler, as well as the proprietary, demoralizing all branches of the trade. This condition was the subject of extended discussion and animadversion for a number of years at various meetings of the several associations involved; different means for remedying it being proposed. The plan finally formu-

states or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding five thousand dollars or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court."

"Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any Circuit Court of the United States in the district in which the defendant resides, or is found, without respect to the amount in controversy and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

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lated was adopted upon an overture from the retailers at the annual meeting of the wholesalers at Chicago in September, 1900, in which the proprietors as associate members participated. It seems to have had its inception in a resolution passed at the preceding annual meeting of the wholesalers, in conformity to which the chairman of the proprietary committee and the chairman of the executive committee of the retailers sent out in March, 1900, a confidential circular, in the joint names of the two associations, to various patent medicine proprietors, urging them for the future to confine their best price sales to a uniform list of jobbers to be selected as wholesale agents. A number of prominent proprietors, who had already agreed to the proposed policy, was given, and in order to make it effective it was urged that each should send out to his wholesale distributing agents a printed price list, giving the regular rebates on goods when ordered in certain quantities, to be restricted, however, to those who did not divide quantities with others, or quote or sell these preparations, either directly or indirectly, or permit them to be disposed of in any way, at less than the prices stated. Favorable responses were received to these circulars, but at the suggestion of members of the retail trade, as well as in pursuance of views expressed by a large percentage of the jobbers, it was decided that the selection of the list of wholesale agents, to whom alone best price sales should be made, should be subject to certain conditions: (1) That jobbers through their salesmen should refrain from running down proprietary goods, and should sell whatever was called for by the customer without reference to any particular article happening to pay a higher profit; (2) that they ask no further discounts than already allowed; (3) that each jobber discontinue his so-called nonsecret department (referring to substitute preparations offered in place of proprietary medicines called for); and (4) that they refrain from selling proprietary preparations at any price, either directly or indirectly, to aggressive cutters or brokers; an aggressive cutter being defined as a dealer who was so designated by 75 per cent of the local trade at any given place. The plan so recommended was adopted, not only, as already [25] stated, by the National



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Wholesalers' Association, but by the proprietors and retailers as well, and became the so-called "Tripartite Agreement" in suit. To be successful, it required the adherence and concerted action of the members of each association, and this was secured by direct appeal and individual assent. As the result of it, the proprietors sold only, thereafter, at uniform and fixed prices, to those wholesalers and jobbers who agreed to maintain prices and not sell to aggressive cutters and brokers; the recognized list of such jobbers being furnished to the proprietors by the chairman of the proprietary committee of the wholesalers, and the list of aggressive cutters, as reported by local associations of retailers, whose organizers investigated the matter, being made up and sent out to jobbers and proprietors by the secretary of the national retailers. If a wholesaler failed to regard this list, and sold to an aggressive cutter, he was promptly reported, and his name added to it. A pink slip was also sent out to all retail druggists who were members of the retailers' association, calling attention to the fact, and insinuating that such individual action be taken by each, protective of his own interest, as might seem advisable; a cessation of dealing being plainly intimated. And this was followed, in case of a correction of his ways by the wholesaler and his reinstatement, by a yellow slip, announcing that he was entitled to the same favorable consideration as before.

Notwithstanding, however, the seemingly drastic character of these provisions, the aggressive cutter having still a certain margin on which to trade if not thrive, at the annual convention of the National Retailers' Association at Cleveland in 1902, it was resolved:

"That \* \* \* the secretary be instructed to request all manufacturers of chemicals, pharmaceuticals, plasters, dressing, and like products, handled by the drug trade, to desist from selling to aggressive cutters, or suppliers of cutters, when solicited to do so by the respective local associations; and that the retail druggists shall be made acquainted with the responses to such requests, in such manner as the executive committee may deem best."

This is the so-called "Resolution C," to be referred to more fully by that name as we proceed. Under the date of November 6 following, the national secretary accordingly addressed

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a circular letter to each of the manufacturers indicated, propounding the question whether, when specifically requested by local associations of retail druggists throughout the country affiliated with the National Retail Association, they would refuse all sales to those parties whom the various manufacturers of proprietaries had designated as aggressive cutters. To this appeal a large majority of the manufacturers made favorable reply; but, others having failed to do so, a second circular was issued, May 1, 1903, again calling attention to the matter, and notifying the parties addressed that there would be published in the official paper of the national association, called "Notes," a list of those who acquiesced and those who did not, requesting definite answer, as before. "It is believed," as it is significantly said in closing, "that a little reflection will convince you of the desirability of co-operating with the secretary of the N. A. R. D.\* in the discharge of the important duty [26] that has been laid upon him." The second circular brought in a large number not secured by the first; the names of several of the defendants being found in the published list. The resolution under which this action was taken did not suggest the specific use which was expected to be made of the information conveyed by the publication, but several who had given in their adherence to the plan having fallen by the way, an honor roll was proposed later on, which should contain the names of those wholesale druggists and jobbers who refused, in the words of the committee, "to have any business dealings whatever with unfair price-demoralizers"; to be made up according as favorable response was made to the circular, and to be published the same as the other in the N. A. R. D. "Notes." In this connection, in the issue of January 22, 1904, the following assurance was given, anticipating, somewhat, the argument of counsel here:

"There is no federal or state law that can possibly be construed in such a way as to compel any jobber to sell goods he has bought and paid for to any person or persons he does not want to. This is a free country, \* \* \* where freedom of trade within its borders is guaranteed by constitutional provisions; and each wholesaler has an

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\* National Association of Retail Druggists.

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unalienable right to frame for himself a selling policy, in accord with his own ideas of what is best for his individual interest and the trade at large, and then to adopt and put this policy into effect."

There were other and further suggestions, from time to time, for concerted action against price cutters, in line with what has been so referred to—such as requiring salesmen to have cards of identification and regularity; providing for the advancing and making uniform the prices for prescriptions; having proprietors refuse to patronize newspapers where cut prices were advertised; and doing away with the necessity for a special request from local retail associations, in order to have wholesalers refuse to sell to aggressive cutters—all, except, perhaps, the last, emanating from and being advocated by the National Retailers' Association. But it is not necessary to follow the matter further. Sufficient has been given to show the character of the combination in restraint of trade which is charged, and the only question is as to the law which is to be applied. It is contended, on the one hand, that no unlawful combination is made out, the manufacturers of proprietary goods having the right to decide, each for himself, as was done, to whom and upon what terms and conditions he would sell, or whether he would sell at all; it making no difference, provided his policy in this regard was individual, whether it coincided with a similar policy, adopted by others of the same class or not, nor that the action so taken was to that extent concerted. The tripartite agreement, to which alone the proprietors subscribed, was not, according to this, unlawful; and as to anything after that to which they did not agree, or which they did not recognize or subscribe to, such as the so-called "Resolution C," with its honor roll and white list, got up by the secretary of the retailers on his own motion, under it, they are not answerable; and these were therefore improperly admitted in evidence against them. It is argued, on the other hand, that the combination and conspiracy for which action is brought is not to be limited to the tripartite agreement, or the sale of proprietary medicines to which it related, which was, however, unquestionably, an unlawful restraint of trade, within [27] the meaning of the act. But that it is to be taken as

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extending to everything which was done concertedly to carry out the pervading idea, to which the defendants individually and collectively subscribed, which was to cripple and drive out of business, by coercive measures, such cutters of prices as 75 per cent. of the local trade at any given place declared obnoxious. This, it is claimed, was the real conspiracy, of which the various steps taken were merely manifestations or overt acts, including "Resolution C," the "Roll of Honor List," etc.; all of which were therefore admissible against the defendants generally.

Both contentions are right to a certain extent; neither can be sustained in its entirety. Undoubtedly the originator and compounder of a proprietary medicine may shape his own policy, and sell or withhold from selling, as he pleases, according to supposed self-interest or whim; fixing the prices and naming the terms and conditions at and upon which alone he will do so, refusing to those who will not comply. And so far as this is confined to his own goods, and pursued by independent and individual action, it cannot be challenged. It is quite a different matter, however, when two or more combine and agree that neither will sell to any one who cuts the prices of any of the others. This concerted policy, by which it is sought not only to maintain by each the price of his own medicines, which alone he is interested in or has the right to control, but also the prices on those of all who are thus banded together, is manifestly a direct interference with and restraint upon the freedom of trade, which in commerce between the states it was the object of the act of Congress to preserve. As in every conspiracy, it is the joining together of a number that counts, and that the individual has to fear. It is true that a common plan or policy does not necessarily mean a combined one. The individual manufacturer or proprietor may be persuaded, for example, that the retailer or jobber who cuts the medicines of his neighbor to-day will likely cut his medicines to-morrow, and so decide not to sell him; and it will not make out a conspiracy that others are of the same mind. If that was all there was to the present case, it would be easily disposed of. But, unfortunately for the defendants, it is not. The policy adopted

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and pursued with respect to aggressive cutters and those who sold to them was not that of the proprietors only, acting independently, each with regard to his own, according to what seemed to him good. The arrangement was tripartite, in which all the affiliated associations of the drug trade were involved—proprietors, wholesale distributing agents or jobbers, and retailers, the latter, if anything dominating it—evolved after extended agitation, discussion, and conference, to which the members were individually and collectively bound, disciplinary and coercive measures being provided against any who proved recalcitrant. Let a patent medicine man or wholesaler disregard its terms, and he was quickly given to understand that, if he catered to the aggressive cutter, he could not expect the custom of the organized retailer, between whom it did not usually take him long to decide. He became, if he persisted, an unfair trader, to be treated accordingly, until he repented and was reinstated, after acknowledging the error of his ways, and agreeing to transgress no more. Against this discipline, and with this rod held over them, it is needless to say that [28] there were few who went astray, and still fewer who held out. There was, perhaps, a murmur here and there, a question raised as to whether they might not overstep the law, and a recognition that they were close to the line; but it was met by assurances such as that quoted above, or by suggestions of escape by individual action, which can hardly be expected to deceive. Nor did, indeed, the individual proprietor control his own prices, nor determine to whom his goods should go. This was done for him in the cities by the local associations of retail druggists, into whose hands he thus committed himself. The prices which should there prevail were of their naming, and aggressive cutters were those who did not maintain them, who were ferreted out, and reported by the retailers' agents. All this and more was part and parcel of the tripartite plan, to which the proprietary, as well as the wholesaler, bound himself when he entered into it.

If co-operation and concerted action such as this does not make out a combination and conspiracy in restraint of trade, it is difficult to see what would be effective to do so. The

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combination is clear, and has been demonstrated; so, also, is the restraint of trade. That indeed was the avowed purpose of it, which was not simply to put the aggressive cutter out of business, but to maintain prices to the consumer, by this means, as they would not be maintained if left to themselves. It seems incredible, except as the trade in patent medicines is known to be immense, but it is confidently asserted, by those having the right to speak, that the cost to the country of the tripartite agreement amounted to \$90,000,000 in six years. The general public have thus as usual, been made to foot the bill. That this constitutes in law, as in fact, an unlawful combination in restraint of trade, within the meaning of the act, there can be no doubt. Whatever may be decided elsewhere, the question is set at rest by *Addyston Pipe Co. v. U. S.*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, and *Montague v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608, which control. In the former there was a combination among certain manufacturers of cast-iron pipe, controlling two-thirds of the business in states of the South and West, by which they agreed to advance the prices to the consumer by abolishing competition between themselves, parceling out the territory, and fixing the prices at which sales should be made therein, going through the form of bidding against each other at times as a blind; the prices and the successful bidder in each case being pre-arranged. It was sought to defend this action, because the restraint was only partial, not extending to the whole United States; also, that the monopoly secured was not complete, being tempered by fear of competition from others not in the arrangement, and affecting only a modicum of the price; and again, that the prices fixed were reasonable, and within those which were being continually and unrestrainedly made, simply doing away with ruinous competition, to which the parties had a right. But these and other arguments were put aside, and the case declared to be one prohibited by the act. "It is the effect of the combination," says the court, "in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealings in the commodity, that is to

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be regarded." So in *Montague v. Lowry*, by an agreement between eastern manufactur[29]ers of tiles and certain dealers in San Francisco and vicinity, an association was formed whose by-laws provided that no manufacturer should sell to any dealer not a member, nor should any dealer sell to the same except at certain list prices, which were 50 per cent. higher than those at which sales were made to other members; membership also being confined to those who carried an average stock of not less than \$3,000 and who were acceptable. The plaintiffs were dealers in San Francisco, where they had built up a business, but were not members of the association, and were not eligible; and after its formation they found themselves unable to buy to advantage, being restricted to dealing with San Francisco parties, to whom they were compelled to pay the extra prices listed. On a suit against the association for damages under the act, a verdict for the plaintiff was sustained; the case being held to be clear. It is useless, in the face of these authorities, to urge upon us the decision in *Park v. National Druggists' Association*, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578, where a different conclusion has apparently been reached. It is to be noted, however, with regard to that case, that the agreement there, as viewed by the majority of the court, was merely to sell to all wholesale distributing agents at uniform rebate prices, so that the small dealer, with limited capital, was put on a par with the large ones, whose capital was more ample, thus tending to fairness and equality, on which stress is laid. There was, however, the further provision (to say nothing of other restrictions) that until a wholesaler agreed to the plan he could not buy of any member of the association whatever, in view of which three of the judges dissented; the case being still further weakened as an authority by the failure of the majority to altogether agree in their reasoning. At the best, therefore, it is near the line, and in no event can it be taken, contrary to the cases cited, as giving the law here.

So far, then, as the present case was kept within the limits indicated by these observations, it was correctly disposed of, and is to be sustained; but outside of them not. Unfortu-

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nately it did not stop with the tripartite agreement and the action taken under it, but went on to Resolution C, with its honor roll and white list. It is urged that these were merely further steps in the general combination and conspiracy, to get rid of the aggressive cutter, on which all were determined, and for which, therefore, by whomsoever taken all were bound. But this fails to note several things. Speaking broadly, no doubt there was a general purpose, or conspiracy, if you will, to drive the plaintiff and others like him out of business, to which in entering into the tripartite agreement the parties committed themselves. At the same time, however, there was a selection of methods. Not only was a general policy declared for, but a definite line of action under it, adopted after extended consideration and conference, which could not be varied from at will. In accepting the tripartite plan, they did not necessarily agree to anything and everything which might be done in its name, and particularly not to Resolution C, which was recognized as a new and decidedly advanced step, expected to work a radical change. As already stated, this project emanated from the National Retail Druggists' Association, in annual convention assembled at Cleveland in 1902. But even among the retailers there were those who doubted the propriety, [30] as well as the legality, of it; as witness the remarks of the president, at the annual meeting just before that, at which, having been proposed, it was promptly voted down. Nor was it ever adopted by the proprietors or the wholesalers as a body; the only assent given to it being individual, and by no means by all. This was secured by direct appeal, and the circulars sent out were addressed to "Manufacturers and Dealers in Non-tripartite Goods"; showing that a different class was intended to be reached.

No connection, except the most general one, is thus established between the tripartite agreement and Resolution C, and they are not to be taken as one and the same plan. They may not differ much in principle, but they do decidedly in results; pressure being put upon the aggressive cutter as it had not been by any means before. By the one, he was



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merely deprived of patent medicines, as to which, right or wrong, the proprietor might feel that he had a certain freedom to sell or withhold, the same as is argued here; but by the other, he was cut off from the most ordinary druggists' supplies, even toothbrushes and sponges being denied. A retailer can not do much, it is true, without proprietary goods on his shelves; but without drugs and pharmaceuticals he can not put up a single prescription, and might as well go out of business; and that, indeed, was what Resolution C was designed to bring about. This was an excursion into a new field, and to whatever else short of that the proprietor or wholesaler was committed, he might not care to go that far. He was at least entitled to have it distinctly presented for his acceptance before being bound, and his assent is not to be implied simply because he had agreed to what had gone before. He did not put himself indiscriminately and to all lengths into the hands of his associates. The trade recognized that this was the case, and that there were classes among the wholesalers, as shown by the publication called "Notes," of May 21, 1904, where those operating under the tripartite agreement are set apart from those operating under Resolution C. This may not be conclusive, but it is significant, and confirms, as it corresponds, with our own views.

As distinguished by parties, also, the combination was new. No doubt there were many who had agreed to the tripartite plan, who also agreed to Resolution C. But there were some who did not, who are defendants here, as well as some who agreed to the resolution alone. They divide on these lines, and can not be brought together as one, so far as anything has been shown; and neither, as the result, can a joint action be maintained. As the case stands, however, all are made liable without distinction, for all that has been done, both under the tripartite agreement, as well as Resolution C; both being put in evidence against them all. It may be that a person who joins a conspiracy at an advanced stage of it makes himself party to what has been done in pursuance of it before. 3 Greenl. Ev. § 93, Lewis Ed. 8 Cyc. 658. But this must be with knowledge, and in promotion of the com-

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mon cause. And even though, upon this basis, those wholesalers, who, with knowledge of the existing purpose to drive aggressive cutters out of business, lent themselves to this design, by denying him their goods as called for by Resolution C, could be held for the damages resulting from the whole scheme, still, as already pointed out, there is too wide [31] a divergence between the original tripartite plan and this latter extreme development of it to make those who merely agreed to the one committed irretrievably and without question to both.

Upon the whole case, therefore, we reach the conclusion that Resolution C was inadmissible to charge those who had not assented to it, and should not have been received in evidence, nor anything done under it. The wrong which was committed by its adoption and enforcement was separate and distinct from that which resulted from entering into and carrying out the tripartite plan, as were also the damages experienced therefrom. The plaintiff in this respect pressed his case too far. He had a good one against some of the defendants under the tripartite agreement, and another against others under Resolution C, and against some, no doubt, upon both, but not against all; and there was the mistake. A joint tort being charged, not only had it to be proved as laid (*Howard v. Union Traction Co.*, 195 Pa. 391, 45 Atl. 1076; *Wiest v. Traction Co.* 200 Pa. 149, 49 Atl. 891, 58 L. R. A. 666; *Rowland v. Philadelphia*, 202 Pa. 50, 51 Atl. 589), but the defendants had all to be liable for all that was resolved upon or done. This, in the view we take of it, was not the case, and the judgment must therefore also be reversed upon this ground.

This reversal is general, and applies to all the defendants, which renders it unnecessary to consider the special argument which was made for some. It will be for the trial judge, when the case comes up again, to determine, in the light of what has been said, how far they and others can be held.

Judgment reversed, and a new trial awarded.

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## [923] UNITED STATES v. MCGOWEN &amp; OTHERS

[U. S. A.]

(Circuit Court, S. D. New York, December, 1907.)

[48 Fed. 521.]

**MONOPOLIES—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE.—**  
**INDEMNITY.**—An indictment under section 1 of 2 of the anti-trust law of July 2, 1890 (chapter 467, 26 Stat. 206 [U. S. Comp. St. 1901, p. 3206]), for engaging in a combination in restraint of interstate commerce, or for attempting to monopolize a portion of the same, sufficiently sets out the time of the combination or attempted monopoly when it alleges the time when the several acts tending to establish the offense were done, and it is not essential to set out the precise time when the purpose was formed or the time of the combination or attempted monopoly was first formed.<sup>1</sup>

[924] **SAME—CONSPIRACIES AND CONSPIRACY.**—An indictment for engaging in a combination and also for a time when in restraint of interstate commerce considered, and need, in sufficiently describe the combination and conspiracy.

**MONOPOLIES—INDEMNITY.**—An indictment under the anti-trust law of July 2, 1890 (chapter 467, 26 Stat. 206 [U. S. Comp. St. 1901, p. 3206]), charging in separate counts a combination and a conspiracy in restraint of interstate trade and an attempt to monopolize a portion of such trade, all based on the same transactions, is not bad for duplicity as to either count, on the theory that each alleged overt act set out to support the charge of conspiracy is charged as a separate offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 57, Indictment and Information, §§ 337-341.]

**MONOPOLIES—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE.—**  
**INDEMNITY—JURORS OR INTERFERERS.—**IMPEACHMENTS AND OVERT ACTS.—  
 In an indictment under the anti-trust law of July 2, 1890 (chapter 467, 26 Stat. 206 [U. S. Comp. St. 1901, p. 3206]), the offenses thereunder being made misdemeanors, all who aid in their commission may be charged as principals, and a suggestion and its officers who personally participate in committing the same, may be joined as defendants, although their acts may have been separate and not done at the same time.

**SAME—NATURE OF SCHEMES PROHIBITED.—**EFFEY AS INTERSTATE COMMERCE.—Whether any given business scheme falls within the prohibition of the anti-trust law of July 2, 1890 (chapter 467, 26 Stat. 206 [U. S. Comp. St. 1901, p. 3206]), as a combination or conspiracy

<sup>1</sup> See post, page 100.

<sup>2</sup> Syllabus copyrighted, 1907, by West Publishing Co.

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in restraint of interstate commerce, or an attempt at monopoly of a portion thereof, is to be determined by its effect on interstate commerce, which need not be a total suppression of trade nor a complete monopoly, but it is sufficient if its necessary operation tends to restrain interstate commerce, and to deprive the public of the advantages flowing from free competition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Monopolies, §§ 10-14.]

**SAME.**—A secret arrangement between two corporations, which together produced about 85 per cent of all the licorice paste consumed in the United States and sold to consumers throughout the country, by which they ceased competition, fixed from time to time the prices at which each should sell, and apportioned the customers between them, and also by concerted action secured contracts with their chief, if not only competitors, which enabled them to control either the output of such competitors or the prices at which and the persons to whom they should sell, and in pursuance of which scheme they were enabled to and did advance the price of the article to all purchasers nearly 50 per cent within a few months, was one directly affecting interstate commerce, and constitutes a combination and conspiracy in restraint of such commerce, and an attempt to monopolize a portion of the same, within the prohibition of the anti-trust law of July 2, 1890 (chapter 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Monopolies, § 13.]

**SAME—JOINDER OF DEFENDANTS IN INDICTMENT.**—In an indictment against such corporations under the statute, their presidents, who are alleged to have personally made the arrangement and participated in carrying it out, may be joined as defendants, and cannot claim immunity on the ground that they were not personally engaged in interstate commerce.

**CORPORATIONS—CRIMINAL RESPONSIBILITY—CONSPIRACY.**—A corporation may be liable criminally for the crime of conspiracy.

**[825] MONOPOLIES—INDICTMENT UNDER ANTI-TRUST LAW—JOINDER OF DEFENDANTS.**—A number of defendants may be charged jointly, under section 2 of the anti-trust law of July 2, 1890 (chapter 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), with the crime of attempting to monopolize a part of interstate commerce.

On demurrer to indictment.

*Henry L. Stimson*, U. S. Atty., and *Edwin N. Hill*, Special U. S. Atty. (*Henry W. Taft*, *Felix H. Levy*, *Edwin P. Grosvenor*, and *Oliver E. Pagan*, special assistants to the Attorney General, of counsel).

**Online & On-Site**

**A. H. BRYANT, JR. FOR DISTRICT ATTORNEY**

**Ernest E. Baer** is the managing director

[illegible]

## How to Write Your Paper

The defendant submitted in answer to each of sections 1 and 2 of the act of July 2, 1906, chapter 10, an affidavit in U. S. Comp. Ct. D.C. p. 220, commonly known as the "Sherman Anti-Trust Law," and claiming that during the first charging a communication and the second a letter sent in restraint of interstate trade and commerce, while the latter asserts an attempt to monopolize a portion of the same, and the courts are based upon the same language of law, that in effect assert that the same words, facts and circumstances constitute at once a communication, trade and commerce.

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should be no competition, and (b) fixed excessive noncompetitive prices accordingly, and (c) sold for such prices only, and (d) procured others to do the like. (a) to (d) are "means by which." The second "way in which" is that all customers were apportioned among the corporate defendants and their allies; the third that production was limited, and the fourth that uniform contracts were required from customers. Ap- [826] propriate "means" are alleged "by which" the second, third and fourth "ways" were rendered effective.

The first (or combination) count then shows at great length very numerous "overt acts" which are really statements of intended evidence, and reveal the sequence of events and the resulting conditions as follows: Prior to and on December 8, 1903, the MacAndrews & Forbes Company (hereinafter called the "MacAndrews Company") was engaged in the manufacture and sale of licorice paste, having factories in Newark and Camden, in the State of New Jersey, and offices in the city of New York; the J. S. Young Company (hereinafter called the "Young Company") was similarly engaged at Baltimore, Md. The defendants Jungbluth and Young were (and at the time of the presentment of this indictment still were) the presidents of the MacAndrews Company and Young Company, respectively. Licorice paste is a substance made from a root not grown in the United States, and is (beside certain apparently limited uses in pharmacy) a prime necessity for the manufacture of plug and smoking tobacco, as well as of snuff and cigars. At the time first mentioned the MacAndrews Company seems to have been by much the largest producer of paste in this country, and, taken together, the two corporate defendants are said to have supplied about 85 per cent. of our national requirements for this substance. There was and is also a manufacturer in Providence, R. I.—one Lewis—and also one in New York—Weaver & Sterry—neither doing a large business, but both seemingly worthy of consideration. Collectively these four producers of paste appear to have been actually supplying almost the entire trade demand. On December 8, 1903, a written agreement was executed by and between the cor-

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porate defendants, whereby, through the device of owning control of the common stock of the Young Company, and guarantying ample dividends on the preferred stock thereof, the MacAndrews Company became for all practical purposes the owner of the Baltimore business, and after that date the Young Company, although maintaining a separate corporate existence, became the creature of the MacAndrews Company, whose officers even issued orders directly to at least one person known to the public only as an agent of the Young Company. Shortly afterward, and on December 31, 1903, the Young Company effected a written contract with Lewis, of Providence, whereby the latter agreed for the space of five years to limit his production to a fixed amount per annum, on which the Young Company guaranteed him a certain profit, one-fourth of which, however, was semiannually to flow back to the Young Company, while the profit on any excess production and sale by Lewis was to go entirely to the latter company, which was also given power to regulate Lewis' sale price, provided that his minimum profit was not thereby destroyed. For reasons not shown, Lewis' price was always to be one-quarter of a cent per pound less than that of the Young Company. The subsequently alleged transactions show that the control of Lewis' business thus established extended to limiting his customers, and declaring to whom he could and could not sell his produce.

Three of the four above-mentioned producers of paste having thus been bound together by careful contracts, the Young Company, on [827] January 2, 1904, authorized Lewis to sell at 7 cents per pound, and on January 11 it informed the trade generally that its price was 7½ cents. So far as alleged in the indictment trade conditions remained as above outlined until the middle of March, when the defendant Young advised Jungbluth that he thought Weaver & Sterry of New York were ready "to come to some agreement," and quoted Sterry as thinking the time ripe for a "sharp advance." Apparently some of the consumers were of the same opinion, and by May 9th Young wrote that some manufacturers had concluded to "stock up all they can," and furnished Jungbluth with a list of certain orders received by his company,

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tending to prove the truth of his suspicion. Whereupon, on May 14th the MacAndrews Company, having received an order from a manufacturer on Young's list, replied that they had raised their price to 9 cents per pound, and by circular letter informed the trade to the same effect. Two days later the Young Company advised the trade that their price had risen to 8½ cents, and thereafter it is alleged that the quoted rates for licorice paste furnished by the MacAndrews Company were always higher by ½ cent per pound than those of the Young Company, which in turn gave a price one-quarter of a cent a pound greater than that of Lewis. This "sharp advance" evidently did not quench the desire of some manufacturers to lay in an ample supply of paste against the possibility of a further rise, which desire was met in the instances given by informing one applicant that, "owing to political and other conditions in the licorice root producing countries," no continuing contract for deliveries could or would be made, and telling another that the quantity demanded was beyond his "normal requirements," therefore, only one-quarter of the amount asked for would be sold to him. This last applicant was the well known house of Bagley & Co., and in early June the Young Company warned both Lewis and the MacAndrews Company against this concern's tendency to "stock up," which the defendant Young had so paternally checked. By the end of June, 1904, the negotiations between Young and Weaver & Sterry had resulted in an alleged agreement, not reduced to formal contract, so far as shown, that the uniform minimum price for pastes should be fixed at 9½ cents per pound after July 1st, that no contracts for furnishing an indefinite quantity even at that price should be made, and that such price agreement should endure, as between the paste producers, until the close of 1906. Jungbluth was in Europe at this time, but cabled his assent to the scheme on July 2, 1904.

Subsequent events appear to show that for the limited trade permitted to Lewis the minimum price was still to be one-quarter cent per pound lower than that charged by the Young Company and Weaver & Sterry. Immediately after July 2d, therefore, it is alleged that the Young Com-



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pany advised customers of the 9½ cent price, while the MacAndrews Company quoted 10 cents as their price. Weaver & Sterry having thus been placated, and "maintaining their own prices at not less than 9½ cents," the MacAndrews Company, on July 23d, advised the New York agent of the Young Company that it was "the better policy" for Lewis to enter into "further contracts," the form of [828] which was then "under discussion." A short time afterwards the form and substance of the proposed contracts was declared to the trade at large, and the perfected trade arrangement is alleged to have been explained in a letter from the Young Company's New York agent to Lewis, substantially as follows: As far as pre-existing contracts would permit, the MacAndrews Company would thereafter sell to no one but the factories affiliated with the American and Continental Tobacco Companies; and in case any other manufacturer attempted to buy from the MacAndrews Company, the action to be taken by that company would "be effective;" and, so far as is shown by the indictment, it was effective, and consisted in uniformly demanding a higher price for the product than any one else suggested. To the "independent tobacco manufacturers" (i. e., others than those comprised in the so-called "trust") Lewis and the Young Company offered a form of contract, binding for two years, whereby the supply demandable by the manufacturer was fixed at a minimum which he had to take, and a 25 per cent. greater maximum, which was all he could get, at 9¾ cents per pound from the Young Company, and 9½ cents a pound from Lewis, with a covenant on the manufacturer's part not to resell, and the price to be subject to increase for the second year. The persons with whom Lewis could make this agreement were fixed ultimately by the MacAndrews Company, which instructed both Lewis and the Young Company to sell to no one whose requirements exceeded 20 cases per annum and who failed to sign the proffered contract. Those who objected to the contract and "very small consumers" (i. e., those using less than 20 cases per year) might still obtain paste at 10¼ cents per pound from Lewis, or 10½ cents per pound from the Young Company; but, as

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seems to have been authoritatively suggested by the Young Company's agent, the "small people" would "not be able to get their supplies elsewhere, as the MacAndrews Company would have none to sell them anyhow."

The "independent" trade, which seems to mean the general public, did not view the result of these arrangements with pleasure. Instances are alleged of continued endeavors to get paste, first from one and then from another producer. Such infractions of discipline the MacAndrews Company met with a form of letter enjoined upon and distributed by the Young Company, stating that, "in view of present and prospective conditions mainly as to supplies of root," it was thought best to supply only those manufacturers who were "willing to join us in contracts as presented to you," i. e., the two-year obligation heretofore described. These measures were apparently "effective," and by September 2d one firm of the most persistent seekers after licorice paste not furnished under long contract at 93¼ cents per pound had telegraphed their submission, and extended with some humor their "heartly congratulations" to the defendant Young, who had forced the contract upon them; while before the close of that month it is alleged that all demands for paste from persons who had not contracted were bluntly declined for that reason, unless the applicant belonged to the class of "very small consumers," for whom the Young Company's open price was 101½ cents per pound.

[829] If therefore it shall appear that the allegations of the indictment are well pleaded, it is admitted, for the purposes of this hearing, that within the space of eight months the corporate defendants, by the execution of corporate agreements and an arrangement of their corporate activities, in respect of which the individual defendants were the efficient devisers and performers, had obtained substantial control of a business whose produce is essential to one of the largest activities of the country, and had parceled out between themselves and their allies the trade of the Union, so that any given manufacturer's business freedom was reduced to a choice between signing a contract to take what he required from the producer selected for him by the MacAndrews

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Company, or paying a substantially higher price, than that named in the offered contract, provided he was permitted to buy anything after refusing such contract. During the same short period, and as a part of this successful campaign, the open price of the commodity had been raised nearly 50 per cent, i. e., from  $7\frac{1}{4}$  to  $10\frac{1}{2}$  cents per pound, and the increase been made effective for two years—a term not expired at the date of finding this indictment, viz., June 18, 1906.

The second or "conspiracy" count charges that the defendants did "knowingly conspire" and "engage in a conspiracy" in restraint of the same interstate trade within the same period, and did the same things in the same way set forth in the same manner as in the first count; while the third or "monopoly" count charges that "in and by engaging" in the combination first charged the defendants "knowingly attempted to monopolize" the interstate trade in licorice paste.

The specifications of demurrer may be divided into those directed (1) to the form of the indictment, and (2) to the substance thereof.

In point of form it is urged: (*a*) That the first and third counts do not sufficiently allege the time when the pretended combination or monopoly took place or was committed. (*b*) That the combination count is bad, because it does not describe the combination, but only its results and effects, without any averment as to how it was to operate in restraint of trade, or that it was when the defendants engaged therein a prohibited combination. (*c*) That the conspiracy count is bad because it does not sufficiently describe the alleged conspiracy. (*d*) That all the counts are bad for duplicity, and none of them "charge" the crimes alleged. (*e*) That in all the counts there is an improper joinder of the corporate and individual defendants, as to which the corporations complain that they are indicted for a violation of law by their officers, while the individuals complain that they are indicted for a violation of law by their corporations, but both declare that they are not jointly indictable therefor.

In point of substance it is urged: (*a*) That none of the counts describe a crime under the Constitution and laws of

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the United States, inasmuch as the facts shown can produce at most but an indirect and incidental effect on interstate trade and commerce. (b) That the individual defendants are not alleged to have been, and were not, engaged in interstate commerce. (c) That the individual defendants cannot be guilty under the circumstances shown of any crime under [830] either section 1 or section 2 of the anti-trust law; every act alleged being a corporate act. (d) That the conspiracy count is bad because a corporation cannot be guilty of conspiracy. And (e) The monopoly count is bad because but one person, acting alone, can be guilty of the offense created by the statute.

(a) Time of combination and monopoly. It is true that the gist of the alleged offenses is the combination or the attempt at monopoly, but it is not true that the offenses are complete when the combination is mentally formed or the mental intention to monopolize arises. The statutory offense, and the one charged herein, does not depend upon "a single agreement, but [on] a course of conduct intended to be continued"; yet, nevertheless, "the thing done and intended to be done is perfectly definite." *Swift v. United States*, 196 U. S. at page 400, 25 Sup. Ct. 281, 49 L. Ed. 518. That case arose on the civil side of the court, but it is to be remembered that the same facts and acts which expose violators of this statute to civil suit also render them subject to indictment. In this case, while the time is indefinite, the thing done is definite, and that is all that the statute requires.

To show that an exact time may be, and therefore must be, assigned for the commission of the offense of combination, the defendants argue upon the meaning of the word "engage" as used in the statute, and strenuously urge that since the offense prohibited is that of "engaging in" a combination, it must be complete as soon as the accused employs his attention or effort in or about the same, that such employment of attention or effort is capable of precise assignment in point of time, and they challenge the prosecution to name the day.

The statute is not directed against such an abstraction as this. It does not require on the part of the prosecution

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clairvoyance to discover or locate the offense. Its prohibition is not directed against a state of mind, but against a state of facts. The facts do not simultaneously occur; the events are not contemporaneous. It may, and naturally would, require time for the working parts of the combination to become cooperative, or for the monopoly to become more than a hope; and what is forbidden and renders the actors obnoxious to the criminal law is not an undiscoverable thought or hope, but a perfectly obvious result or condition. The condition or state of facts against which the statute is directed is a continuing condition, and therefore the offense of creating and maintaining that condition is necessarily a continuing offense, and does not, from its very nature, require greater particularity in assignment than is used in this indictment.

(b) Combination not described. The argument that the indictment describes only the results and effects of the combination, but not the combination itself, rests, I think, on a misreading of that instrument. Admitting that it is necessary to charge, not only the commission of the offense, but "all the circumstances constituting" the same (*United States v. Greenhut* [D. C.] 51 Fed. 205; *Re Greene* [C. C.] 52 Fed. 104), and excluding from consideration the "overt acts," the combination count not only charges the offense in ampler words than those of the statute, but shows by the "ways in which" the offense was committed all the necessary circumstances; i. e., that the defendant de- [831] stroyed competition, apportioned customers, limited production, and required uniform contracts. The "means by which" of the indictment are explanatory of the above clear averments, which show both the nature of the combination and the method of its operation.

The special argument for the individual defendants on this branch of the demurrer seems to me to rest on the idea that there must have been a time when the corporations entered into a contract or contracts, which contractual relation was, in and of itself, the prohibited combination, and that the statutes should not be construed to apply to those who, not being parties to such original agreement, merely participated

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at a subsequent time in furthering the objects thereof. "Combination" is a word not yet possessed of an accurate legal meaning; its place in the terminology of criminal law is, I believe, no older than this statute. Of itself it means no more than "cooperation"—a union of effort—and if I am right in believing the act to be aimed at the result of such united effort or cooperation, it can make no difference whether those personally assisting in or contributing to such wrongful result were original laborers in the vineyard or came at the eleventh hour; their statutory recompense is the same.

(c) The conspiracy not described. Unlike "combination," "conspiracy" is a term of art. In the anti-trust law it is to be interpreted independently of the preceding words (*United States v. Debs* [C. C.] 64 Fed. at page 747), and an indictment thereunder should therefore describe something that amounts to a conspiracy under the act conformably to the rules of pleading at common law, as perhaps modified by general federal statutes. The elements of conspiracy to be here considered are that it must depend upon the concerted action of two or more persons to accomplish an unlawful result by any means, or a lawful result by unlawful means. *Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419. The statute declares, in effect, that if the purpose of the concerted action is to restrain trade between the states, such purpose is unlawful, and the concert of action is a conspiracy. It is wide enough to cover, not only a destruction of the trade of competitors by wrongful means, as in *United States v. Patterson* (C. C.) 55 Fed. 605, but any restraint of interstate trade if the same be accomplished by a predetermined and concerted action of two or more individuals. It is not necessary on demurrer to draw a distinction between the crimes of combination and conspiracy; the sole question is whether the second count states a conspiracy within the act. It is admitted that "what was done in pursuance of the alleged conspiracy is irrelevant, and cannot be laid hold of to enlarge the necessary allegations of the indictments" (*United States v. Patterson*, supra, at page 639 of 55 Fed.; *United States v. Britton*, 108 U. S. 204, 2 Sup. Ct. 531, 27 L. Ed. 698.) Lay-

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ing aside, therefore, the details of the "over acts," I believe, by the same reasoning hereinbefore applied to the combination count, that the conspiracy count does describe both the nature of the combined action and the illegality of the object sought to be accomplished.

(d) Duplicity, etc. The analysis of the indictment first above made convinces me that each alleged offense is sufficiently charged. The [832] suggestion of duplicity rests upon the assumption that each one of the alleged "overt acts" is charged as a separate indictable offense. The same analysis shows the error in this argument. The true reason for the rule against duplicity is that the "jury can not split up a count in an indictment, and find the accused guilty of a part and not guilty of the balance; their verdict must be an entirety." *State v. Smith*, 61 Me. 386. I can see no possibility of the jury being thus misled in this case.

(e) Improper joinder. By this branch of the demurrer all the defendants admit that the acts alleged were done. The individuals aver that, *ex necessitate rei*, the acts were of the corporation. The corporations declare that, inasmuch as no corporation can commit a crime except through human instrumentality, the acts were human; but, as there was but one crime, it must be fundamentally wrong to charge both the corporation and its instrument therewith. This argument seems to depend upon the assumption that every factum set forth in the indictment is a piece of joint activity by all the defendants. This is not true. It is charged that the unlawful combination, conspiracy, or monopoly was the result of joint action, but all of the persons alleged to be jointly responsible were not necessarily all doing the same things at the same time. There is nothing inherently impossible in the corporations doing one thing and the individuals another at or about the same time, which things were utterly different; yet all, when dovetailed together, go to make up the joint product labeled by the act—combination, conspiracy, or monopoly. It is conceivable that the evidence may show that the individual defendants were not free agents, but acted under a species of corporate coercion, for which they should not be held personally responsible; but it is impossible to

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arrive at this conclusion on demurrer. The series of cases arising under the indictment regarding the *Distilling & Cattle Feeding Company (In re Greene)* [C. C.] 52 Fed. 104, *U. S. v. Greenhut*, 51 Fed. 205, and *In re Terrell* [C. C.] 51 Fed. 213), show no more than that the courts have conclusively presumed that the relation between a corporation and its stockholder is not such that the latter can be held to criminal responsibility for a violation of the law in which he is not alleged to have personally participated.

It is not without significance that offenses as serious, in congressional opinion, as those created by this statute are made misdemeanors. When the statute declares that certain acts notoriously to be accomplished under modern business conditions only through corporate instrumentality shall be misdemeanors, and further declares that the word "person" as used therein shall be deemed to include corporations, such statute seems to me clearly passed in contemplation of the elementary principle that in respect of a misdemeanor all those who personally aid or abet in its commission are indictable as principals. This is learnedly and fully treated by Van Brunt, J., in *People v. Clark* (O. & T.) 14 N. Y. Supp. 642, and I am compelled to the conclusion that, under this statute, if the officer or agent of a corporation charged with fault be also charged with personal participation, direction, or activity therein, both may be so charged in the same indictment. This procedure has been followed in *People, etc., v. Detroit White Lead Works*, 82 Mich. [833] 471, 46 N. W. 735, 9 L. R. A. 722, and *Overland Cotton Mill v. People, etc.*, 32 Colo. 263, 75 Pac. 924, 105 Am. St. Rep. 74; nor do I think the holding in the rebates cases (*United States v. N. Y. C. & H. R. R. et al.*, lately decided in this court, 146 Fed. 298) irrelevant to the present issue. The indictments in those cases were based upon those clauses of section 1 of the act of February 19, 1903 ("Elkins Act") chapter 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599], which declares that "anything done \* \* \* by a corporation \* \* \* which if done \* \* \* by any \* \* \* officer thereof \* \* \* would constitute a misdemeanor \* \* \* shall also be held to be a misdemeanor committed by such corpora-



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tion," and "every person or corporation who shall \* \* \* grant or give \* \* \* any \* \* \* rebate \* \* \* shall be deemed guilty of a misdemeanor." This is not a specific authorization for a joint indictment; it is a declaration that the same act shall at one and the same time be a misdemeanor on the part both of the officer, who is the actor, and the corporation, who suffers him to act. The language of that statute seems to me to render a joint indictment permissible, but if, as in this case and under this statute, that which is complained of is not one single act, which is at the same time individual by nature and corporate by act of Congress, but a condition of facts to which both corporate and individual action may be contributed, a joint indictment is not only permissible, but, if it be desired to bring in all the actors and produce all the evidence, it may even be necessary.

Having concluded that the material allegations of the indictment are well pleaded, there remain for consideration the objections going to the merits of the charges.

(a) No direct effect on interstate commerce shown. Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. The criterion as to whether any given business scheme falls within the prohibition of the statute is its effect upon interstate commerce, which need not be a total suppression of trade nor a complete monopoly; it is enough if its necessary operation tends to restrain interstate commerce, and to deprive the public of the advantages flowing from free competition. Cf. *U. S. v. Chesapeake & Ohio Fuel Co.* (C. C.) 105 Fed. at page 93; *Swift v. United States*, 196 U. S., at page 375, 25 Sup. Ct. 281, 49 L. Ed. 518; *Northern Securities Co. v. United States*, 193 U. S., at page 382, 24 Sup. Ct. 436, 48 L. Ed. 679. Applying these general considerations and the case of *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, to the case in hand, I have no doubt that the arrangement alleged in the indictment immediately, directly, and of intention restrained interstate trade. It is enough to instance the allotment of certain tobacco manufacturers to certain paste producers by a secret agreement that only the assigned producer would or

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could supply the needs of the manufacturer. This is a restraint of trade surpassing anything shown in the *Addyston Case*. Defendants seem to regard the original agreement between the MacAndrews Company and the Young Company as the gist of this proceeding. That was but the first step, and the law looks not at any particular act, but at the [534] aggregate effect of all the acts. The whole series of transactions is to be judged by its fruit, and not by the legal significance of any one occurrence.

It may be admitted (to paraphrase the language of Jackson, J., in *Re Greene* [C. C.] 52 Fed., at page 116) that the ownership by the defendant corporations of all the licorice paste in this country is not what the statute condemns, but it does condemn the monopoly of, or attempt to monopolize, the interstate trade or commerce therein. These corporate defendants are said not only to have obtained control of their principal, if not their only, competitors, but, having done this (which may be within the decision in the case of *Sugar Refining Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325), they have seen to it that their product was followed from factory to consumer, until with their system working perfectly they not only controlled the source of supply and regulated production, but regulated the consumption of every person in the land who required what they made. This conduct "directly concerned the shipment of goods from one state to another," and operated, "not alone upon the manufacturer, but upon the sale, transportation, and delivery of an article of interstate commerce by preventing or restricting its sale." *Montague v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608, as cited in 193 U. S. 390, 24 Sup. Ct. 436, 48 L. Ed. 679. Not only do the facts alleged show a combination producing a result detrimental to interstate commerce, but they also show concerted action to bring about that result, and the result as shown constitutes that "virtual" monopoly in the interstate distribution of the substance manufactured by the corporate defendants which brings the matter within the decisions differentiating the modern use of the word "monopoly" from that grant by royal patent which was the origin of the phrase. *People, etc., v. North River Sugar Ref. Co.*, 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33,

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18 Am. St. Rep. 843; *Id.*, 54 Hun, 354, 3 N. Y. Supp. 401, 2 L. R. A. 33, 7 N. Y. Supp. 406, 5 L. R. A. 386; *State v. Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541; *De Witt Wire Cloth Co. v. N. J. Wire Cloth Co.* (Com. Pl.) 14 N. Y. Supp. 277; *Nat. Cotton Oil Co. v. Texas*, 197 U. S. 115, 25 Sup. Ct. 379, 49 L. Ed. 689; *United States v. Knight*, 156 U. S., at page 17, 15 Sup. Ct. 249, 39 L. Ed. 325.

(*b* and *c*): Individual defendants not engaged in interstate commerce, and every act alleged a corporate act. It is seriously urged that every act alleged in the indictment is a corporate act, and that, as the individual defendants are presidents of the corporations, therefore the acts are not their acts, even though they actively performed them; and further, even if such corporate acts operated on and related to interstate commerce, that the men who gave the orders, wrote the letters, and signed the contracts were not in so doing engaged in interstate commerce.

As to the first branch of this argument I refer to my already stated opinion, that it cannot be ascertained upon demurrer whether the acts were all corporate acts or not, or whether or to what extent the in- [835] dividual defendants in doing what they did were acting as mere clerks, or as advisers, devisors, or abettors.

If the second branch of the argument is sound, it must result that the president of a railroad and the president of a college are engaged in the same business, i. e., that of being president. It might as well be said that the governor of a state and the governor on a steam engine are both engaged in the business of being governor.

(*d*) Corporations cannot conspire. The doctrine, much older than the *Dartmouth College Case*, 4 Wheat., at page 636, 4 L. Ed. 629, but there fixed in federal jurisprudence, that a "corporation is an artificial being, invisible, intangible, existing only in contemplation of law, and, being the mere creation of law, it possesses only those properties which the charter of its creation confers," has been the excuse for much idle and artificial reasoning. It was long contended that even a civil liability arising from evil intent could not be visited upon an artificial being. This fiction has vanished, and cor-

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porate liability on the civil side firmly established, even for assault (*Lake Shore, etc., Ry. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97), or conspiracy (*Buffalo Oil Co. v. Standard Oil Co.*, 42 Hun, 153; *Id.*, 106 N. Y. 669, 12 N. E. 826; *West Va. Trans. Co. v. Standard Oil Co.*, 50 W Va. 611, 40 S. E. 591, 56 L. R. A. 804, 88 Am. St. Rep. 895). It was even longer denied that a corporation could be indicted at all. *Regina v. Great, etc., Ry.*, 9 Q. B., 314. In *People, etc., v. Clark*, *supra*, the court declares that the legal reasoning upholding this contention was the strange argument that a corporation could not plead in person, and therefore could not be called on to answer criminally. It certainly is now admitted law that not only may corporations (the art of pleading by attorney having been discovered) be indicted for nonfeasance, but for such deeds of misfeasance as are complete by the mere doing of the thing prohibited, e. g., violation of the eight hour law (*United States v. John Kelso Co.* [D. C.] 86 Fed. 304); receiving usurious interest (*State v. First Nat. Bank*, 2 S. D. 568, 51 N. W. 587); not stopping gaming at a fair (*Commonwealth v. Agricultural Soc.*, 92 Ky. 197, 17 S. W. 442).

Authority is still producible, however, for the dogma that corporations "cannot be indicted for offenses which derive their criminality from evil intention" (*Commonwealth v. Proprietors of New Bedford Bridge*, 2 Gray [Mass.] 339), nor "for any crime of which a corrupt intent or malus animus in an essential ingredient" (*State v. Morris & Essex Ry.*, 23 N. J. Law, 260). Therefore, these defendant corporations claim that since in conspiracy evil intent is of the essence of the crime, inherent impossibility renders the accusation futile. I think this is but the remnant of a theory always fanciful and in process of abandonment. The process is slow, but in *Telegram Newspaper Co. v. Commonwealth*, 172 Mass. 294, 52 N. E. 445, 44 L. R. A. 159, 70 Am. St. Rep. 280, a court of great authority recently held in a proceeding for criminal contempt:

"We think that a corporation may be liable criminally for certain offenses of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil."

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[836] And to the same effect *State v. B. & O. R. R.*, 15 W. Va. 362, 36 Am. Rep. 803. It is notable that the older cases asserting the immunity here contended for are rarely decisions granting such immunity, but speak of it as something theoretically true, yet not applicable to the matter in hand. It seems to me as easy and logical to ascribe to a corporation an evil mind as it is to impute to it a sense of contractual obligation. There is an obvious physical difficulty in rendering a corporation amenable to corporal punishment, but there is no more intellectual difficulty in considering it capable of homicide or larceny than in thinking of it as devising a plan to obtain usurious interest. The limitation of power does not depend upon the difficulty of imputing evil intent, but upon the impossibility of visiting upon corporations the punishments usually prescribed for greater crimes. The same law that creates the corporation may create the crime, and to assert that the Legislature cannot punish its own creature because it cannot make a creature capable of violating the law does not, in my opinion, bear discussion.

(e) Monopoly by one only. Section 2 of the act (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) undoubtedly renders it possible for one single person to be punished under this statute for either a monopoly or an attempt to monopolize, whereas it is difficult to imagine one person combining, and, obviously, one person cannot conspire. But having regard to the modern use of the word "monopoly" as meaning something quite different from the royal grant of earlier law, I see no reason why any number of persons may not enjoy a monopoly, or may not attempt to monopolize. Furthermore, it is to be remembered that even when monopoly had its ancient meaning, the grant of the right was not limited to one person; the grantees were frequently in the plural.

Let the demurrers be overruled.

## Opinion of the Court.

**[836.] UNITED STATES *v.* MacANDREWS & FORBES  
CO. ET AL.<sup>a</sup>**

(Circuit Court, S. D. New York. January 17, 1907.)

[149 Fed. 836.]

**CRIMINAL LAW—IDENTICAL OFFENSES.**—Where defendants were indicted in separate counts, one for combination and the other for monopoly, in violation of the Sherman anti-trust law (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), such offenses were not identical, but were legally distinct and justified separate punishment on conviction.<sup>b</sup>

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 32, 33.]

**MONOPOLIES—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE—EVIDENCE—OVERT ACTS.**—A combination in restraint of interstate commerce in violation of the Sherman anti-trust law was proven when the combination was shown to exist with intent to bring about restraint on interstate commerce; the overt acts being merely cumulative evidence from which the intent, purpose and continuance of the combination might be inferred.

On defendants' motion in arrest of judgment and to set aside the verdict.

[837] *Henry W. Taft*, Sp. Asst. Atty. Gen.

*Delancey Nicoll* and *John D. Lindsay*, for defendants.

HOUGH, District Judge.

The indictment which was considered on demurrer in opinion filed herein December 3, 1906 (149 Fed. 823), having come on for trial, and resulted in a verdict of guilty against the corporate defendants upon the first and third counts only—i. e., those for combination and monopoly under the Sherman anti-trust law (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200])—motion is now made to set aside the verdict upon numerous grounds, as to all which except one I have in the opinion referred to expressed my views, and to those views I adhere.

It is now urged that the charges of combination and monopoly as stated in the indictment and explained by the

<sup>a</sup> Dismissed in Supreme Court by counsel for MacAndrews & Forbes Co., on October 18, 1908 (212 U. S., 585).

<sup>b</sup> Syllabus copyrighted, 1907, by West Publishing Co.

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evidence constitute but one offense, and that, therefore, either (1) the verdict is void and judgment thereon unlawful, or (2) that no punishment can be awarded upon more than one count, as to impose a fine under both counts would amount to a double punishment for the same offense. This problem differs from that presented on demurrer. The indictment in form correctly charges both a combination and a monopoly; and circumstances certainly exist under which the evidence to support the charge of combination would be quite different from that proving monopoly. It is clear, also, that the two charges might not be provable against the same individuals; but with the testimony before the court it is apparent that the evidence here was in some sense applicable to both charges, and, as the verdict shows, affected both defendants. If all the crimes charged against a given person are committed in accomplishing one unlawful action or in bringing about one unlawfully desired result, it is clearly improper to split up the transaction into as many parts as there are crimes incident to the fulfillment of unlawful desire, and thus multiply punishment by multiplying indictments or counts.

It appears to me that the decisions relied on by the defendants depends solely on this admitted principle. Thus the forgery of a bond and mortgage is but one unlawful transaction, and separate indictments will not lie for forging the two instruments. *People v. Peck*, 4 N. Y. Cr. R. 148. And the obligation of street commissioners to keep the highways in repair is a single duty, and there cannot be separate indictments or counts each alleging a failure to keep a particular street in repair and all speaking as of the same date. *State v. Commissioners*, 6 N. C. 371. So, also, a conviction for arson is a bar to an indictment for murder in compassing the death of one burned in the building. *State v. Cooper*, 13 N. J. Law, 361, 25 Am. Dec. 490, because the arson and the murder were simply successive stages of one offense. The true test of the correctness of the defendants' position is whether upon a review of both the facts and the law identity exists between the offenses proved in this case and called in the first combination and in the third monopoly. If identity

## Opinion of the Court.

does exist, a conviction under either count would be a bar to a prosecution on the other, and therefore a bar to punishment on both. The rule regarding identity of offenses is to discover whether the crimes under considera- [838] tion are in substance precisely the same, or of the same nature or species, or that one crime is an ingredient of the other. In this case the crimes of monopoly and combination are legally distinct. The offense under the first count was complete when the combination was actually formed with intent to bring about restraint of interstate commerce. The additional overt acts were but cumulative evidence from which the true intent, purpose, and continuance of the combination might be inferred. But they were themselves the proof of the monopoly, and the monopoly consisted in their aggregate effect. That the prosecution in overwhelmingly proving the existence, and intent, and continuance of the combination proved the monopoly does not in my opinion render the offenses identical, merely because all the evidence offered was in a sense applicable to both counts. How slight the difference may be to deprive the plea of former jeopardy or autrefois convict of validity the cases clearly show. Identity of time so that it was impossible to separate the evidence regarding them, is not sufficient. *People v. Bentley*, 77 Cal. 7, 18 Pac. 799, 11 Am. St. Rep. 225. Identity of name, though difference in substance, is no bar. *Gully v. State*, 116 Ga. 529, 42 S. E. 790. An acquittal for larceny of bonds is no bar to a conviction for fraudulent conversion thereof. *Commonwealth v. Tenney*, 97 Mass 50. A burglary on the second floor of a house is a different crime from robbery on the first floor, though the interval between the events is no longer than is required for the criminal to go downstairs (*People v. Kerm*, 8 Utah, 268, 30 Pac. 988), and an acquittal of murder by a shot from a gun is not a bar to accusation for the same murder by using the gun as a club (*Guedel v. People*, 43 Ill. 226). See, also, *Polinsky v. People*, 73 N. Y. 65, where the offense of selling adulterated milk under one statute is regarded as a different crime from bringing adulterated milk into the city for sale under another statute.

Believing that the offenses of combination and monopoly are different in law, and different in substance and effect, it



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is necessary to deny all the motions now pending and made by the defendants either jointly or severally. It is the judgment of the court that the MacAndrews & Forbes Company be upon its conviction under the first count of this indictment fined the sum of \$5,000, and that the same company be upon its conviction under the third count of the indictment fined the sum of \$5,000 and that the J. S. Young Company be upon its conviction under the first count of the indictment fined the sum of \$4,000, and that the same company be upon its conviction under the third count of the indictment fined the sum of \$4,000.

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**[838] DR. MILES MEDICAL CO. v. JAYNES DRUG CO. ET AL.**

(Circuit Court, D. Massachusetts. December 12, 1906.)

[149 Fed. 838.]

**INJUNCTION—INDUCING VIOLATION OF CONTRACTS—SUFFICIENCY OF BILL.**—A bill by a manufacturer of proprietary medicines, sold only to wholesale and retail druggists having direct contracts with complainant, to enjoin defendant from inducing such customers to break such contracts by [839] selling to defendant in violation of their terms, is sufficiently certain, although it does not specify the customers who have so been induced to violate their contracts, where it shows that, before reselling the medicines so procured, defendant removes the cartons, labels, and serial numbers from the bottles, so that they cannot be traced to any particular customer.\*

**SAME.**—Such a bill states a cause of action for an injunction where the contracts sought to be protected are lawful.

**CONTRACTS—LEGALITY—CONDITION IN CONTRACTS FOR SALE OF PROPRIETARY MEDICINES—RESTRAINT OF TRADE—MONOPOLIES.**—The manufacturer of an article sold as a medicine, and made under a secret process or formula of which he is the sole owner, may lawfully, by contracts with purchasers, impose such conditions as he sees fit with respect to the prices at which they shall be sold to others, or the persons to whom they may be sold; and such contracts, like similar contracts with respect to articles made under a patent or copyright, are outside the rule of restraint of trade, whether at com-

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mon law or under the federal anti-trust statute. Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200].

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 542, 544.

Monopolistic contracts—validity as affected by public policy, see note to *Chicago, M. & St. P. Ry. Co. v. Wabash, St. L. & P. Ry. Co.*, 9 C. C. A. 666; *Cravens v. Crater-Crume Co.*, 34 C. C. A. 486.]

In equity. On demurrer to bill.

*Frank F. Reed, George L. Huntress, and Edward S. Rogers*, for complainant.

*Whipple, Sears & Ogden and Alexander Lincoln*, for defendants.

COLT, Circuit Judge.

This is a bill in equity for an injunction and an account. The defendants have demurred to the bill. The grounds of demurrer relied upon are the special ground that the allegations of the bill are insufficient for want of certainty, and the general ground that the bill does not state a case which entitles the complainant to relief in equity. The material allegations of the bill may be summarized as follows:

The complainant is the exclusive owner of certain secret formulas for making proprietary medicines, and is extensively engaged in the manufacture of these medicines. It sells these medicines to wholesale and retail druggists on what is known as the direct contract plan. Under this system of agency contracts, the medicines are sold to jobbers, retailers, and consumers at fixed and uniform prices, and the jobbers agree to sell only to retailers who have executed contracts, and these retailers agree to sell only to purchasers for consumption. The medicines are put up in various original and distinctive cartons and bottles, bearing certain labels, trade-marks, and trade-names. As a means of identifying each package, serial numbers are stamped upon the carton.

All druggists are given full opportunity of signing these contracts and of obtaining these articles at fixed and uniform prices. These contracts are in force between the complainant and nearly all the wholesale druggists of the

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country and over 40,000 retail druggists. The purpose of the system is to prevent secret rebates, discrimination, price-[840] cutting, demoralization of trade, and injury to the reputation and good will of the complainant's business.

The defendants are wholesale and retail druggists, having stores in various places in the city of Boston. Refusing the opportunity offered them to execute these contracts, the bill charges that the defendants have combined and conspired with complainant's agents, and that they have adopted a system of illegally and fraudulently obtaining these medicines. The methods employed consist in inducing retail dealers to execute contracts for the purpose of procuring these medicines from jobbers, and then turning over the medicines so procured to the defendants; in procuring contracts from retailers, and persuading jobbers to sell complainant's medicines, ostensibly to such retailers, but in reality to defendants; in persuading and inducing retail druggists under contract with the complainant to supply these medicines to defendants in violation of such contracts, or by deceiving such retailers into sales by fraudulently stating that the purchases are for consumption, and not for resale. The defendants, it is alleged, offer for sale and sell the medicines so obtained at cut rates, thereby demoralizing prices, depleting trade, and causing irreparable injury to the complainant. The defendants further employ the complainant's medicines as a means of attracting customers, and then substituting and selling other remedies, thus inducing such customers to abandon their original intention of purchasing the complainant's medicines. In case of the sale of complainant's medicines, the defendants mutilate, obliterate, or cover up the trade-marks, trade-names, and serial numbers upon the packages or cartons.

The bill prays that the defendants may be enjoined from persuading persons who have entered into contracts with the complainant from breaking their contracts by selling and delivering to the defendants the complainant's medicines, and from procuring from any retail druggist the execution of contracts with the complainant, and from passing themselves off to any jobber under contract with the complainant as representing a retail druggist who has executed a proper con-

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tract, and from procuring in any way the complainant's remedies from any wholesale or retail dealer who has entered into contracts with the complainant in violation of those contracts, and from mutilating or defacing the complainant's packages, or changing its cartons or labels, and for other relief.

The theory upon which this bill is framed is clear. The complainant's medicines are only sold to wholesale and retail druggists under direct contracts with the complainant. The complainant finds that the defendants are selling its medicines at cut rates in mutilated packages. The bill charges the defendants with having obtained these medicines by unlawfully combining with, persuading, or deceiving, the agents of the complainant to break their contracts, and thus obtaining these medicines illegally and in violation of these contracts, and the bill seeks to enjoin the defendants from pursuing this course of conduct.

The bill contains a sufficiently clear statement of all the material facts to enable the defendants to make the proper defense thereto. It is probably impossible for the complainant to make the allegations more specific by naming the particular druggists with whom the defendants [841] have combined and conspired, since it appears from the bill that the defendants obliterate the identifying serial numbers upon the packages they sell. By this means the complainant is prevented from ascertaining the jobber or retailer to whom the package was originally sold. The bill, however, does set forth with great fullness the title and rights of the complainant and the violation of those rights. It alleges, in various forms and with sufficient definiteness, the substantial facts of collusion, combination, and persuasion by the defendants with wholesale and retail druggists who are under contract with the complainant. It is a course of conduct which the bill seeks to enjoin, rather than any particular act. The rules of certainty do not require any more specific statements in bills of this character. *Swift & Co. v. United States*, 196 U. S. 375, 400, 25 Sup. Ct. 276, 49 L. Ed. 518; *United States v. Bell Telephone Co.*, 128 U. S. 315, 356, 9 Sup. Ct. 90, 32 L. Ed. 450.

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The remaining and more important question is whether the bill states a case for relief in equity. If the complainant's system of contracts is lawful, it is clear that the allegations of the bill are sufficient, for the bill charges the defendants with unlawfully combining with and persuading the complainant's agents to break their contracts, and thereby obtaining complainant's medicines in violation of those contracts, and this is a familiar and well-settled ground of equitable relief. *Wells & Richardson Co. v. Abraham* (C. C.) 146 Fed. 190; *Dr. Miles Medical Co. v. Platt* (C. C.) 142 Fed. 606; *Angle v. Railway Co.*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55; *Garst v. Charles*, 187 Mass. 144, 72 N. E. 839; *American Law Book Co. v. Thompson Co.* (Sup.) 84 N. Y. Supp. 225; *Board of Trade v. Christie*, 198 U. S. 236, 251, 25 Sup. Ct. 637, 49 L. Ed. 1031; *Exchange Telegraph Co. v. Gregory*, L. R. 1 Q. B. D. (1896) 147; *Sperry & Hutchinson Co. v. Mechanics' Clothing Co.* (C. C.) 128 Fed. 800. See, also, *Heath v. American Book Co.* (C. C.) 97 Fed. 533; *Walker v. Cronin*, 107 Mass. 555; *Moran v. Dunphy*, 177 Mass. 485, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289; *Lumley v. Gye*, 2 El. & Bl. 216; *Bowen v. Hall*, 6 Q. B. D. 333.

It only remains to inquire whether the system of contracts set out in the bill is lawful. It is to this point that the arguments and briefs of counsel have been largely addressed. The contention of the defendants is that these contracts are unlawful because they are in restraint of trade. In support of this position they do not rely so much upon the common-law rule as upon the federal statute. Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200].

The bill alleges that the complainant is the exclusive owner of these secret formulas, and the exclusive manufacturer of these remedies. It follows that, until voluntary disclosure or lawful discovery, the complainant has an exclusive property in these trade secrets, and has the exclusive right to make, use, and vend the articles made thereunder. The exclusive right of property in a trade secret is, of necessity, a monopoly, the same as a patent or a copyright. The complainant may make these articles, or refrain from making

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them. It may sell them, or refrain from selling them. It may sell them to one person, and not to another, and at such prices and upon such conditions as it may deem most advantageous. Contracts like those set out in the bill concerning [842] articles made under trade secrets, the same as similar contracts concerning articles made under a patent or a copyright, are outside the rule of restraint of trade, whether at common law or under the federal statute. *Hartman v. Park* (C. C.) 145 Fed. 358; *Dr. Miles Medical Co. v. Platt* (C. C.) 142 Fed. 606; *Wells & Richardson Co. v. Abraham* (C. C.) 146 Fed. 190; *Dr. Miles Medical Co. v. Goldwaite* (C. C.) 133 Fed. 794; *Bement v. National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; *Board of Trade v. Christie*, 198 U. S. 236, 252, 25 Sup. Ct. 637, 49 L. Ed. 1031; *Garst v. Harris*, 177 Mass. 72, 74, 58 N. E. 174; *Fowle v. Park*, 131 U. S. 88, 97, 9 Sup. Ct. 658, 33 L. Ed. 67; *Park & Sons Co. v. National Wholesale Druggists' Ass'n*, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578; *Standard Fireproofing Co. v. St. Louis Co.*, 177 Mo. 559, 76 S. W. 1008; *Victor Co. v. The Fair*, 123 Fed. 424, 61 C. C. A. 58; *Heaton-Peninsular Co. v. Eureka Co.*, 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728; *Central Shade Co. v. Cushman*, 143 Mass. 353, 9 N. E. 629; *Good v. Daland*, 121 N. Y. 1, 24 N. E. 15.

Demurrer overruled.

[933] THOMSON ET AL. v. UNION CASTLE MAIL  
S. S. CO., Limited, ET AL.<sup>a</sup>

(Circuit Court, S. D. New York. January 16, 1907.)

[149 Fed. 933.]

MONOPOLIES — COMBINATION AMONG SHIPOWNERS — REASONABLE RESTRAINT.—Where a combination of foreign shipowners engaged in South African trade allowed certain rebates to New York shippers who patronized the ships belonging to the combined owners exclusively, such arrangement constituted only a partial and reasonable restraint on foreign commerce, and was therefore not unlawful at common law.<sup>b</sup>

<sup>a</sup> Judgment reversed by the Circuit Court of Appeals, Second Circuit (166 Fed. 251). See *post*, page 548.

<sup>b</sup> Syllabus and statement copyrighted, 1907, by West Publishing Co.

## Statement of the Case.

## SAME—SHERMAN ANTI-TRUST LAW—RECOVERY OF TREBLE DAMAGES.—

Foreign shipowners formed a combination abroad to organize and control steamship business between New York and South African ports, after which plaintiffs, who had never before been engaged in South African trade, began to ship goods to such ports, and in common with other patrons of defendant's vessels, became entitled to rebates under a circular issued by defendants in case plaintiffs did not patronize competing vessels, which they afterwards did, whereupon defendants refused to pay further rebates. *Held*, that plaintiffs' right to such rebates, if any, was not an item of damage that proximately grew out of the combination of shipowners, and hence plaintiffs were not entitled to recover the same under Sherman anti-trust act (Act Cong. July 2, 1890, c. 647, § 7, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]), authorizing a recovery of treble damages accruing through an unlawful combination in restraint of interstate and foreign commerce.

## At Law.

This action for treble damages, under section 7 of the Sherman act (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]), came on for trial before Hough, District Judge, and a jury. The defendants named in the complaint consisted of several British shipowners, one German shipowner, and their several American agents. It was alleged that the defendants had formed a combination and a monopoly in restraint of foreign commerce of the United States between the port of New York and the divers ports of South Africa, and that such combination and monopoly had injured the plaintiffs, especially in the sum of £1,112. There was also a prayer for general damages. During the trial the action was discontinued as against the German shipowner and continued without amendment of the pleadings against the British shipowners. It appeared that steamship trade between New York and South Africa began in the year 1893. It was originated by one of the defendants. Within a month or so of the dispatching of the first steamer another of the defendants put a steamship on berth in New York for the same ports. There was some evidence that for the space of from one to three months there had possibly been competition between these two defendants; but certainly from that time, and possibly from the beginning, the defendants thereafter operated their steamships in union, pursuant to arrangements made in England and authoritatively communicated to their New York agents. They charged uniform rates of freight, and arranged the dispatch of their steamers so as not to interfere with each other. In 1898 all the British defendants by a joint circular announced to the trade that those shippers who sent all their South African goods by defendants' steamers, and who shipped said goods to South African consignees, who during certain periods had received no goods from the United States by vessels other than those of the defendants, would be entitled

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to receive a commission, rebate, or return of a certain percentage of the freight moneys demanded by the announced or tariff rates of the defendants between the United States and South African ports. At the time of the issuance of this circular the plaintiffs had never been engaged in South African business. They made their first shipment to that region in 1899 by the line of one of the defendants, and thereafter until their quarrel with the defendants pursued that practice. During the year 1900 difficulties arose between plaintiffs and defendants or some of them in respect of the payment of these rebates. Defendants claimed that either the plaintiffs or their consignees had patronized other lines than those of defendants, and that, therefore, they were not entitled to the rebates demanded. The amount of the rebates so withheld by the defendants or some of them is the £1,112 above specified. As a result of these differences of opinion and withholding of rebates, the plaintiffs were put to certain other expenses in their endeavors to collect said £1,112. This action was brought in June, 1903, and declares that the combination and monopoly existed and plaintiffs' damages were received during 1899, 1900-02, and so on to June, 1903. During that time other steamers from time to time endeavored to get South African business in New York. When such steamer appeared, the defendants or one of them put on berth what they called a "fighting steamer"—i. e., a vessel for which freight would be accepted at rates as low or lower than those offered by the competing vessel—and the capacity of the fighting steamer was as far as possible allotted to and between those shippers who had in the past confined their South African patronage to defendants. The plaintiffs complained that they were not given upon these fighting steamers opportunity of sending all, or, indeed, any large part, of the goods which at the time they had in hand to send, but it appeared that they were given as large a fraction of the fighting steamer's capacity at cut rates as were other shippers similarly situated. These facts having been made to appear upon the examination and cross-examination of the plaintiffs' witnesses, defendants moved to dismiss the complaint.

*Dr. Lorenzo Ullo*, for plaintiffs.

*Convers and Kirlin and Wing, Putnam and Burlingham* (Mr. Thacher, of counsel), for defendants.

HUGH, District Judge (orally).

I feel that the court must decide this case. It is unfortunate that the first legal proceeding to test the applicability of the Sherman anti-trust law to foreign commerce should have been brought under the seventh section of the act, because it perhaps prevents laying a foundation for a really illuminating discussion on that aspect of the statute. If this case had



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been promoted by the United States, or even by a shipowner who, by the combined action of the defendants, had been prevented from freely engaging in commerce between New York and South Africa, I think very different questions would have been presented for consideration; but these plaintiffs can only recover if able to show that they have been injured in their business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by the Sherman act. By the common law it is my opinion that restraint of trade or commerce, if partial and reasonable, is lawful; and that doctrine, as applied to the peculiarities and requirements of the steamship trade, I have always thought was fully, ably, and correctly stated in the case of the *Mogul Steamship Company*. Viewing it as matter of common law, it is my opinion that the trade regulations shown in this case are reasonable in theory or principle, though, perhaps, unwisely interpreted in practice; but I do not think that the general question as to whether reasonable regulations of foreign or interstate commerce are obnoxious to the Sherman act requires consideration in this litigation.

The action as against the Hansa Line and its agents having been discontinued, it appears to me that all the defendants who are left in the case engaged in the steamship business between the United States and South Africa in substantial union. All the defendants are foreign shipowners, except the resident agents of those foreigners, who [935] are merely mouthpieces of their principals, and themselves made no combination whatever except in respect of their own commissions—something obviously not within the purview of the act. Since the foreign steamship lines here concerned agreed upon their concerted action in their home country, and engaged in substantial union in the business of transportation by steam between New York and South Africa from the very beginning, then all the defendants' American and South African steamship trade has been done, as it appears to me to have been done, subject to these foreign made regulations. Under such circumstances I find it impossible to believe that a statute designed to prevent a restraint of existing trade can apply to the conditions under which the trade was born. In the original formation of the defendants' union, therefore, I

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find no infraction of any federal law; and it remains to consider only whether the action of the defendants in putting on what have been called "fighting steamers" constituted something that converted a lawful union into an unlawful one. It seems to me that the fighting steamers, so far from restraining commerce and stifling competition, in and of themselves constituted a very violent competition. The well-known fact that competition carried to its uttermost destroys itself seems to me nothing to the point so far as the Sherman act is concerned, the supreme test of the application of which act has frequently been held to be the stifling of competition to the detriment of the particular commerce concerned.

Now, these plaintiffs began to ship their goods and to ship other people's goods to South Africa long after the only combination shown was made, and I believe made abroad. What South African business the plaintiffs had was created in conjunction with the defendants' combination. The combination injured neither the business nor the property of the plaintiffs, except by possibly depriving them of greater profits than they might have made had the defendants chosen to enter upon American business under other conditions. They were not obliged to enter upon American business at all.

What the plaintiffs are really seeking to recover are the rebates due to those persons who gave their whole business to the defendants. This right to rebate rested on contract, a contract embodied in the fact of shipment evidenced by the usual documents. That contract was not in itself unlawful. If the union of the defendants was not of itself unlawful, each defendant could have made the same contract individually which they made unitedly, could have announced the same contractual purposes, and carried them out. It may be that the action of the steamship companies in withholding the rebates claimed by the plaintiffs was unjustifiable; but the plaintiffs must in this case, and under this pleading, prove that their loss was proximately caused by a violation of the Sherman act. Even if the organization of a new line of foreign commerce, arranged in London to connect the United States with a foreign country, be obnoxious to the Sherman act, though the commerce al-

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leged to be restrained existed prior to the alleged restraint only in posse, it must remain true that whatever may be the rights of the federal government as against such obnoxious combination no private person can recover damages against the members of the [936] combination except such as naturally flow from and are proximately caused by the action of the combination.

These plaintiffs have admitted that they have but one substantial claim of injury from which all their other damages flow, namely, that after they agreed, perhaps unwillingly, to the trade terms of the combination, and by so agreeing obtained and developed trade which they never had before, that then the defendants so interpreted the bargain which they had obtained from the plaintiffs as to deprive the latter of an advantage which the plaintiffs supposed they got by practically going into the combination themselves. Now, this may give plaintiffs a good cause of action upon the contract, or for deceit in not having communicated to them the singular fact that disloyalty of a consignee over whom they could have no control would deprive them of the reward of their own fidelity; but it is not an item of damage that proximately grows out of the combination, even if such combination was in restraint of foreign commerce.

The motion to dismiss the complaint is therefore granted.

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[390] CHATTANOOGA FOUNDRY AND PIPE  
WORKS v. CITY OF ATLANTA.\*

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH  
CIRCUIT.

[203 U. S. 390.]

No. 94. Argued November 9, 12, 1906.—Decided December 3, 1906.

By express provision of the act of July 2, 1890, 26 Stat. 209, a city is a person within the meaning of section 7 of that act, and can maintain an action against a party to a combination unlawful under the act

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\* See also 101 Fed. Rep. 900: Vol. 2, p. 11. 127 Fed. Rep. 29: Vol. 2, p. 299.

## Argument for Plaintiff in Error.

by reason of which it has been forced to pay a price for an article above what it is reasonably worth.<sup>b</sup>

A person whose property is diminished by a payment of money wrongfully induced is injured in his property.

Where Congress has power to make acts illegal it can authorize a recovery for damage caused by those acts although suffered wholly within the boundaries of one State.

Although the sale may not have been so connected with the unlawful combination as to be unlawful, the motives and inducements to make it may be so affected by the combination as to constitute a wrong.

The five year limitation in § 1047, Rev. Stat., does not apply to suits brought under § 7 of the act of July 2, 1890, but by the silence of that act the matter is left under § 721, Rev. Stat., to the local law. The three year limitation in § 2773, Tennessee Code, for actions for injuries to personal or real property, applies to injuries falling upon some object more definite than the plaintiff's total wealth and the general ten year limitation in § 2776 for all actions not expressly provided for controls actions of this nature brought under § 7 of the act of July 2, 1890.

127 Fed. Rep. 23; 101 Fed. Rep. 900, affirmed.

The facts are stated in the opinion.

[391] *Mr. Frank Spurlock*, with whom *Mr. Foster V. Brown* was on the brief, for plaintiff in error:

The city of Atlanta has no cause of action under the Anti-trust Act.

While the declaration alleges that the defendant in error was injured in its business of supplying water to its inhabitants, the averment can only mean that it was injured by the payment of an excessive price for the pipe bought to extend its water mains. There is no allegation showing an injury of any other character either to the business or property of the defendant in error. The action can only be maintained, if at all, on the ground that the defendant in error, as a consumer, has been compelled to pay more for the goods it purchased by reason of the fact that the seller was a part to an illegal combination. *Brown & Allen v. Jacob's Pharmacy*, 115 Georgia, 429; *Boutwell v. Marr*, 71 Vermont, 1; *Doremus v. Hennessy*, 176 Illinois, 608; *Mogul S. S. Co. v. McGregor*,

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<sup>b</sup> Syllabus copyrighted, 1907, by The Banks Law Publishing Company.

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L. R. 15 Q. B. Div. 476; *S. C.*, 21 Q. B. Div. 544; *S. C.*, 23 Q. B. Div. 598.

From the nature and purpose of a combination to restrain and monopolize, it was expected that every contract, combination or conspiracy to restrain trade or to monopolize the same would include among its purposes that of an assault upon the business of independent rival traders. For such action is necessary to complete the illegal scheme.

So by §§ 1 and 2 of the act Congress struck at the initial step towards the creation of these injurious combinations by imposing heavy penalties for joining in them, and by § 7 penalties, in the nature of treble damages and attorneys' fees, were provided to protect the independent trader by giving him a right of action if injured in his business or property by the combination of those endeavoring to create the monopoly.

There is not only no language in the act from which it could be inferred that Congress meant to protect the business of those engaged in trade wholly within the States, but *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 247, held that Congress has no jurisdiction over that part of a combination [392] or agreement which relates to commerce wholly within the State and which is subject alone to the jurisdiction of the State. Whenever, therefore, the business of a waterworks company, or the like, is injured by a combination or monopoly, redress therefor must be sought under the laws of the State under which the business is carried on.

To extend the operation of the act so as to give a right of action, under the seventh section thereof, to every consumer seeking to recover back, as excessive, a part of the price paid for goods bought and shipped from another State, would include a class of actions not contemplated by Congress, and not necessary to insure competition in interstate trade. Such damages could only arise from fraud or deceit in making the sale, and would be governed by the laws of the State under which the contract was made and to be performed. *Montague & Co. v. Lowry*, 193 U. S. 38; *Gibbs v. McNeeley*, 118 Fed. Rep. 127; *Whitwell v. Tobacco Co.*, 125 Fed. Rep. 454.

Defendant in error contracted for the purchase of pipe at an agreed price fixed in the contract. This agreement was

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legal and binding under the laws of Georgia, where it was made and to be performed, notwithstanding the fact that the selling company was a party to a contract in restraint of trade, which was illegal under the laws of the United States. *National Distilling Co. v. Cream City Importing Co.*, 86 Wisconsin, 352; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540.

The Anti-Trust Act is not a legal method of regulating prices. While denying to interstate traders the right to form combinations that would have the power to prescribe prices, Congress did not undertake itself to do, either directly or indirectly, what it prohibited to others. An action for three-fold damages will only lie where there has been an actual, direct injury inflicted by something done in violation of the act (*Minnesota v. Northern Securities Co.*, 194 U. S. 48, 70), and this injury must have been done to the person suing in his business of interstate commerce, or in his property while the subject of interstate commerce.

[393] Under the statute of limitations of Tennessee applicable to this case the suit is barred either in one year as a statute penalty or in three years as an injury to property for tort. *State v. House*, 2 Shannon's Cases, 610; *State v. Shaw*, 113 Tennessee, 536; *Hogan v. Chattanooga*, 2 Tennessee, 339; *Greenwood v. State*, 6 Bax. 567, 576; *Huntington v. Attrill*, 146 U. S. 657, 667; *Merchants' Bank v. Bliss*, 35 N. Y. 412; *Stokes v. Stickney*, 96 N. Y. 326.

A statute may not be penal in the international sense of that term, but penal within the meaning of the statutes of limitations applicable to private actions only. The following cases, brought to enforce statutory liability, were held to be penal actions within the meaning of the statutes of limitations barring civil suits for statute penalties. *Beadle v. Railroad Company*, 48 Kansas, 379; 51 Kansas, 252; *Savings Bank v. Bailey*, 66 N. H. 334; *Gridley v. Barnes*, 103 Illinois, 211; *Baker Wire Co. v. Chicago & N. W. Ry. Co.*, 106 Iowa, 239; *A., T. & S. F. Ry. Co. v. Tanner*, 19 Colorado, 559; *State Savings Bank v. Johnson*, 18 Montana, 440; *Raticon v. Terminal Assn.*, 114 Fed. Rep. 666; *Davis v. Mills*, 113 Fed. Rep. 678; *S. C.*, 121 Fed. Rep. 703; *Patterson v. Wade*, 115 Fed. Rep. 770; *Goodridge v. Union Pac. Ry. Co.*, 35 Fed. Rep. 35;

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*Barry v. Edmonds*, 116 U. S. 550, 565; *Mo. Pac. Ry. Co. v. Humes*, 115 U. S. 522; *Minneapolis Ry. v. Beckwith*, 129 U. S. 35.

If the penalty, or recovery in excess of compensatory damages, is imposed for a failure to pay a debt, and not in the exercise of the police power which concerns the interest of the public, then the statute is unconstitutional. *Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150; *Railroad Co. v. Matthews*, 174 U. S. 96; *Railroads v. Crider*, 91 Tennessee, 490.

The suit was brought not only to recover treble damages for the injury sustained, but attorneys' fees besides. The actual damages as found by the jury were \$1,500; but the judgment rendered was for \$7,000, or nearly five times the damages actually suffered. This judgment can be sustained upon no other principle than that declared in the cases cited—[394] that is, vindictive or punitive damages, and imposed under the police power of the Government for the purpose of deterring others from the commission of similar offenses.

If not barred, however, as a statute penalty in one year, the action is within § 2747, providing that all wrongs and injuries to the property and person, in which money only is demanded as damages, shall be commenced within three years and redressed by an action on the case.

As to what will support an action on the case and fall within this provision see *Love v. Hogan*, 5 Yer. 290; *Allison v. Tyson*, 5 Hum. 449; *Rosson v. Hancock*, 3 Sneed, 434; *Gwinther v. Gerding*, 3 Head, 198; *Bank v. Doughty*, 2 Tennessee, 584; *Railroad v. Guthrie*, 10 Lea, 432; *Ramsey v. Temple*, 3 Lea, 252; *Rhea v. Hooper*, 5 Lea, 390; *James & Co. v. Bank*, 105 Tennessee, 1. The cases cited by court of appeals of Tennessee can be distinguished and that court erred in holding that this action fell under the ten-year statute.

An action may be in the form of debt where the statutory liability is certain, or may be made so from the face of the statute. But while such actions are in form debt, they are criminal in nature and within the statute of limitations relating to criminal proceedings. Civil liabilities founded on statutes may be in the nature of debt, or contract, but an

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action to enforce such liability, whatever its form, would be barred by the statute applicable to contracts; and limitations applicable would always depend on the nature of the liability declared or imposed. *Bagley v. Shoffach*, 43 Arkansas, 377; *Chaffee v. United States*, 18 Wall. 516; *Stockwell v. United States*, 18 Wall. 531. *Bullard v. Bell*, 1 Mason, 243, is inapplicable. See *Householder v. City of Kansas*, 83 Missouri, 488, 495; *Topley v. Forbes*, 2 Allen, 24; *Addison on Torts*, 49; *Knowlton v. Ackley*, 8 Cush. 97; *Stearns v. A. & St. L. Ry. Co.*, 46 Missouri, 114; *Pollard v. Bailey*, 20 Wall. 520, 527; *Hightower v. Fitzpatrick*, 42 Alabama, 600. And see also as to action on the case being the proper remedy, *Aldrich v. Howard*, 7 R. I. 199, 213; *Sandford v. Haskell*, 50 Maine, 86; *Reed v. [395] Northfield*, 13 Pick. (Mass.) 99; *Morrison v. Bedell*, 22 N. H. 238; *Russell v. L. & N. Ry. Co.*, 93 Virginia, 325; *Mount v. Hooter*, 58 Illinois, 246; *Boyn v. Smith*, 17 Wend. 88; *Beatly v. Barnes*, 8 Cr. 98, 108.

Actions for liabilities arising out of duties imposed or acts prohibited by statutes are within the limitation imposed on all similar actions. *Metropolitan Ry Co. v. District of Columbia*, 132 U. S. 1, 13; *Carroll v. Green*, 92 U. S. 509; *Campbell v. Haverhill*, 155 U. S. 610.

The liabilities created by the statutes authorizing the organization of national banks, or for the infringement of patent rights, or rights founded on other acts of Congress, have never been treated as specialties, even though sometimes clearly in the nature of debt. *McDonald v. Thompson*, 184 U. S. 72; *Cockrill v. Butler*, 78 Fed. Rep. 680; *Stephens v. Overstolz*, 43 Fed. Rep. 465.

*Mr. Churchill P. Goree* and *Mr. George Westmoreland*, with whom *Mr. Linton A. Dean* and *Mr. J. L. Foust* were on the brief, for defendant in error.

**MR. JUSTICE HOLMES** delivered the opinion of the court.

This is an action by the city of Atlanta (Georgia), against two Tennessee corporations, members of the trust or combination held unlawful in *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211. The object of the suit is to



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recover threefold damages for alleged injury to the city "in its business or property" under § 7 of the act of July 2, 1890, c. 647, 26 Stat. 209. The alleged injury is that the city, being engaged in conducting a system of waterworks, and wishing to buy iron water pipe, was led, by reason of the illegal arrangements between the members of the trust, to purchase the pipe from the Anniston Pipe and Foundry Company, an Alabama corporation, at a price much above what was reasonable or the pipe was worth. The purchase was made after a simulated [\$96] competition, at a price fixed by the trust and embracing a bonus to be divided among the members. The plaintiffs in error demurred to the declaration, and pleaded not guilty, and that the action accrued more than one year and more than three before the suit was brought, relying upon §§ 2772 and 2773 of the Code of Tennessee, the Eastern District of Tennessee being the district in which the suit was brought. The demurrer to the declaration was overruled and the plaintiff had a verdict and judgment in the Circuit Court. The verdict was for the difference between the price paid and the market or fair price that the city would have had to pay under natural conditions had the combination been out of the way, together with an attorney's fee. The judgment trebled the damages. It was affirmed by the Circuit Court of Appeals, the plaintiffs in error having saved their rights at every stage. The discussions of the law took place before the jury trial was reached. They will be found in 127 Fed. Rep. 23 and 101 Fed Rep. 900. For our purposes it seems unnecessary to state the case at greater length.

The facts gave rise to a cause of action under the Act of Congress. The city was a person within the meaning of § 7 by the express provision of § 8. It was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced is injured in his property. The transaction which did the wrong was a transaction between parties in different States, if that be material. The fact that the defendants and others had combined with the seller led to the excessive charge, which the seller made in the interest

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of the trust by arrangement with its members, and which the buyer was induced to pay by the semblance of competition, also arranged by the members of the trust. One object of the combination was to prevent other producers than the Anniston Pipe and Foundry Company, the seller, from competing in sales to the plaintiff. There can be no doubt that Congress had power to give an [397] action for damages to an individual who suffers by breach of the law. *Montague v. Lowry*, 193 U. S. 38. The damage complained of must almost or quite always be damage in property, that is, in the money of the plaintiff, which is owned within some particular State. In other words, if Congress had power to make the acts which led to the damage illegal, it could authorize a recovery for the damage, although the latter was suffered wholly within the boundaries of one State. Finally, the fact that the sale was not so connected in its terms with the unlawful combination as to be unlawful, *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, in no way contradicts the proposition that the motives and inducements to make it were so affected by the combination as to constitute a wrong. In most cases where the result complained of as springing from a tort is a contract, the contract is lawful, and the tort goes only to the motives which led to its being made, as when it is induced by duress or fraud.

The limitation of five years in Rev. Stat. § 1047, to any "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," does not apply. The construction of the phrase "suit for a penalty," and the reasons for that construction have been stated so fully by this court that it is not necessary to repeat them. Indeed the proposition hardly is disputed here. *Huntington v. Attrill*, 146 U. S. 657, 668; *Brady v. Daly*, 175 U. S. 148, 155, 156.

Thus we come to the main question of the case, namely, which limitation under the laws of Tennessee is applicable, the matter being left to the local law by the silence of the Statutes of the United States. Rev. Stat. § 721; *Campbell v. Haverhill*, 155 U. S. 610. The material provisions of the Tennessee Code are as follows: By Article 2769 (Shannon,

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4466), all civil actions are to be commenced within the periods prescribed, with immaterial exceptions. By Article 2772 (Shannon, 4469), actions, among others, "for statute penalties, within one year after cause of action accrued." By 2773 [398] (Shannon, 4470), "Actions for injuries to personal or real property; actions for the detention or conversion of personal property, within three years from the accruing of the cause of action." By 2776 (Shannon, 4473,) certain actions enumerated, "and all other cases not expressly provided for, within ten years after the cause of action accrued." The Circuit Court of Appeals held that the case did not fall within 2772 or 2773, but only within 2776, and therefore was not barred. Although the decision is appealed from, as this question involves the construction of local law we cannot but attribute weight to the opinion of the judge who rendered the judgment, in view of his experience upon the Supreme Court of Tennessee. And although doubts were raised by the argument, we have come to agree with his interpretation in the main.

As to the article touching actions for statute penalties, notwithstanding some grounds for distinguishing it from Rev. Sts. § 1047, which were pointed out, so far as this liability under the laws of the United States is concerned we must adhere to the construction of it which we already have adopted. The chief argument relied upon is that this suit is for injury to personal property, and so within Article 2773. It was pressed upon us that formerly the limitations addressed themselves to forms of action, that actions upon the case, such as this would have been, were barred in three years, following St. 21 Jac. 1, c. 21, § 3, and that when a change was necessitated by the doing away with the old forms of action, it is not to be supposed that the change was intended to affect the substance, or more than the mode of stating the time allowed. Of course, it was argued also that this was an injury to property, within the plain meaning of the words. But we are satisfied, on the whole, and in view of its juxtaposition with detention and conversion, that the phrase has a narrower intent. It may be that it has a somewhat broader scope than was intimated below, and that some wrongs are within it besides physical damage to tangible property. But there is a sufficiently clear dis-

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inction between injuries to property [399] and "injured in his business or property," the latter being the language of the act of Congress. A man is injured in his property when his property is diminished. He would not be said to have suffered an injury to his property unless the harm fell upon some object more definite and less ideal than his total wealth. A trade mark, or a trade name, or a title, is property, and is regarded as an object capable of injury in various ways. But when a man is made poorer by an extravagant bill we do not regard his wealth as a unity, or the tort, if there is one, as directed against that unity as an object. We do not go behind the person of the sufferer. We say that he has been defrauded or subjected to duress, or whatever it may be, and stop there. It was urged that the opening article to which we have referred expressed an intention to bar all civil actions, but that hardly helps the construction of any particular article following, since the dragnet at the end, 2776, catches all cases not "expressly provided for." On the whole case we agree with the court below.

*Judgment affirmed.*

THE CHIEF JUSTICE and MR. JUSTICE PECKHAM dissent.

[315] ANDERSON ET AL. v. SHAWNEE COMPRESS CO. ET AL.<sup>a</sup>

(Supreme Court of Oklahoma. Sept. 5, 1906.)

[87 Pacific Reporter 315.]

**CORPORATIONS—IMPLIED POWER TO LEASE.**—Where a strictly private corporation finds it cannot profitably continue operations, and such financial exigencies exist as render such action necessary or appropriate, it may lawfully make a lease of its entire property for a term of years, although no express authority to lease is contained in the articles of incorporation.<sup>b</sup>

[Ed. Note.—For cases in point, see vol. 12 Cent. Dig. Corporations, § 1774.]

**CONTRACTS—PUBLIC POLICY—MONOPOLIES.**—A corporation, known as the "Gulf Compress Company," was organized under articles of incorporation which stated that it was to conduct a general storage

<sup>a</sup>Affirmed by the Supreme Court of the United States, 209 U. S. 423. See *post*, page 357.

<sup>b</sup> Syllabus copyrighted, 1907, by West Publishing Co.

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and compress business. Its capital stock, originally \$25,000, was increased to \$1,000,000, of which \$600,000 was in the form of treasury stock. It appeared that the object of the corporation was to gain control of the compress business in the cotton producing area, by means of purchase or lease, exacting from the lessor or vendor in every case a contract that such lessor corporation would not, for a term of years, engage in a like business "within fifty miles of any compress operated by the" lessee, and that the lessor's members, "individually and collectively" would render every assistance "in discouraging unreasonable and unnecessary competition." *Held*, that such corporation, the Gulf Compress Company, so conducted, is unlawful and against public policy, its operation tending to the unreasonable restraint of trade, the prevention of competition, and the establishment of a monopoly.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Monopolies, §§ 10-14.]

**SAME—VOID LEASE.**—And where, in such case, a corporation, known as the "Shawnee Compress Company," formed for the local compression of cotton, undertakes, because of the exigencies of its financial situation, to lease its entire property to said Gulf Compress Company for a period of years, and in such lease, to agree not to engage in the business of compression of cotton within fifty miles of any plant operated by the Gulf Company, and to aid such Gulf Company "in discouraging unreasonable and unnecessary competition," *held*, that the execution of such lease will be perpetually enjoined, or if executed, the contract will be declared an unreasonable restraint of trade, and therefore void on the ground of public policy.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 542-548.]

(Syllabus by the Court.)

Error from District Court, Pottawatomie County; before Justice B. F. Burwell.

Action by Neil P. Anderson and others against the Shawnee Compress Company and others. Judgment for defendants, and plaintiffs bring error. Reversed and remanded.

This action was commenced on May 2, 1905, in the district court of Pottawatomie county, Okl., by the plaintiffs in error against the defendants in error, the purpose being to enjoin the execution of a certain lease contract by the Shawnee Compress Company, its officers and agents, to the Gulf Compress Company, defendants in error herein. In the absence

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of the regular district judge from said county, the probate judge thereof issued a restraining order as against the defendants in error Beatty and Stubbs. An amended petition was filed on May 13, 1905, to which a demurrer was presented and overruled. Thereupon defendants below filed an answer, which contained a general denial coupled with certain admissions and explanatory matter. Plaintiffs below demurred to this answer, and on said demurrer being overruled, filed a general denial as reply. In order that a proper understanding may be had of the issues presented by the pleadings to the court below, so much of the matters set up therein as are essential to a proper consideration of the questions involved in this appeal is given here:

From the amended petition it appears that on April 24, 1905, the plaintiffs in error together owned 139 shares of the capital stock of the Shawnee Compress Company, a corporation organized under the laws of Oklahoma and doing business at Shawnee, Okl., capitalized at \$50,000, with T. F. Stubbs as president and W. H. Beatty as secretary; and that J. M. Aydelotte was president of said company for several years immediately prior to said date. That the Gulf Compress Company is a corporation existing under the laws of Alabama, having its principal office and place of business in the city of Memphis, Tenn., with C. C. Hanson and R. E. L. Martin, as president and secretary thereof, respectively. That certain action was attempted to be taken by the stockholders of the Shawnee Compress Company, looking to the leasing of the entire business, good will, property, franchise, etc., of the said Shawnee Company to the Gulf Company for a period of five years, at a stipulated rental of \$6,000 per year. That the number of the board of directors of the said Shawnee Compress Company was attempted to be reduced from nine to three, the latter consisting of Stubbs, Beatty, and F. E. Anderson. That on the 26th of April, 1905, said Stubbs and Beatty, assuming to act as a majority of the board of directors of said Shawnee Compress Company, pretended to hold a meeting, and thereat to pass a certain resolution authorizing themselves, as president and secretary, respectively, of such company, to execute the aforementioned

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lease contract to the Gulf Compress Company, and did on said date, attempt to execute a written lease to the said Gulf Company, on behalf of said Shawnee Compress Company, for the said period of five years at the stipulated rental of \$6,000 per annum. That said F. E. Anderson, a minority stockholder, protested and objected to all such actions of said Beatty and Stubbs. That no exigencies existed requiring the negotiation of such lease, and that the intention of the Gulf Compress Company, in procuring said lease, was to secure a monopoly of the compress business, and to restrict competition between the compresses already operated by said company and the com- [316] press previously owned and operated by the Shawnee Compress Company, and is therefore void, as being contrary to public policy, and in undue restraint of trade. Other allegations are made, attacking the legality of the proceedings of the board of directors in and about the execution of the alleged lease contract, and such acts are characterized as ultra vires, and void, as against the rights of plaintiff in error, minority stockholders of the said Shawnee Compress Company. The prayer was that the contract be declared void, and that said Stubbs and Beatty be enjoined from assuming to act as president and secretary respectively of said company, and that said company or its officers take no further proceedings looking to the execution of the said lease. Following a general denial, the matters alleged in the answer essential to the questions here are, first, as to the legality of the proceedings of the stockholders, and second, that the execution of said lease was rendered necessary and right by the exigencies of the financial situation of said Shawnee Compress Company. To this answer, plaintiffs below filed a demurrer, which was overruled. They then filed a general denial by way of reply. The action was tried to the court, and resulted, on September 20, 1905, in judgment for defendants below, dissolving the temporary injunction, dismissing plaintiffs' amended petition, and taxing the costs of said action to plaintiffs. Motion for new trial was filed and overruled, and this proceeding in error was thereupon commenced, to review the action of the court below.

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The lease, the execution of which is sought to be enjoined, denominated the Shawnee Compress Company as the "Landlord," and the Gulf Compress Company as the "Tenant." After making provision for the leasing of all the personalty belonging to said Shawnee Company, specifying the period to be five years, the rental \$6,000 per annum, and covering various other items, such as repairs, damage by fire, flood, etc., providing for the itemizing of the leased property, etc., the contract contains the following language: "(6) The landlord shall not, during the term of this lease, without the consent of the tenant, directly or indirectly engage in the compression of cotton within fifty miles of any plant operated by the tenant. \* \* \* (10) The landlord agrees and pledges the tenant its good will, moral and real support, and that it, individually and collectively, will render the tenant every assistance in discouraging unreasonable and unnecessary competition. \* \* \* The tenant further agrees to in no way use its other compresses to the detriment of the Shawnee Compress during the term of this lease." It further appears from the evidence at the trial that C. C. Hanson is the president of both the Atlanta Compress Company and the Gulf Compress Company, being a stockholder in each, and is the one who negotiated the lease in question. That the Atlanta Compress Company operates in the states of Alabama, Georgia, and Florida, and was organized and is owned and controlled solely by the carriers for their benefit. That the board of directors and stockholders of said corporation are composed entirely of railroad officials. That the Atlanta Company controls the operation of 25 plants. That the Gulf Compress Company is a close corporation, chartered in Mobile, Ala., and operating in the states of Alabama, Mississippi, Tennessee, Louisiana, Arkansas, Indian Territory, and Oklahoma, and controlling the operation of 27 compresses in those states, located at various points therein. That none of the Gulf Company's plants and the Atlanta Company's compresses are operated at the same points. It is further disclosed by the evidence that the capital stock of the Gulf Company, as originally incorporated, was \$25,000, but that it has, within the past year, been in-



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creased to \$1,000,000, of which \$600,000 is treasury stock. That its field of operation has been rapidly extended from Alabama to all the cotton growing territory; that it is at the present time engaged in the purchase or leasing of compresses at various points, and as testified to by its president, is "prepared to buy or lease, whichever proposition suits us best." It appears from the evidence that the negotiations conducted by Mr. Hanson with Stubbs and Beatty for the lease of the Shawnee plant was in pursuance of an effort to avoid, "directly or indirectly, the possibility, if not probability, of unnecessary and unreasonable competition." It is further disclosed by the testimony that the carrier pays for the compression of cotton, incorporating the cost thereof in its tariff. That tariffs for the hauling of cotton are established by the railroads as well as hauling districts or territories, within which the haul of cotton must be one way, or otherwise the higher rate, denominated the terminal rate, applies, rendering it unprofitable to ship to other than the established point in the hauling district. Other facts material to the propositions urged by counsel, disclosed by the evidence and other proceedings, will be stated in connection with the argument on the propositions they concern.

*Shartel, Keaton and Wells*, for plaintiffs in error. *Blake-ney* and *Mozey and Woods*, *Basham* and *Biggers*, for defendants in error.

PANCOAST, J. (after stating the facts). The first error assigned is that the court below erred in not deciding that it was beyond the scope of the legal powers of the said Shawnee Compress Company to execute the lease contract in question. We find no express authority to lease set out in articles of incorporation, but we are nevertheless of the opinion the weight of authority is that when a strictly private corporation finds it cannot profitably continue operations, it may lawfully make a lease of its entire prop- [317] erty for a term of years. *Plant v. Macon Oil Co.* (Ga.) 30 S. E. 567; *Morisette v. Howard*, 62 Kan. 413, 63 Pac. 756; 10 Cyc. 1138; *Phillip v. Aurora Lodge No. 104*, 87 Ind. 505; *Nye v. Storer*, 168 Mass. 53, 46 N. E. 402; *Ardesco Oil Co. v. North Am. Oil Co.*, 66 Pa. 375. It is, however, only when such exi-

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gencies exist as necessitate or render appropriate such or similar action that this right can be exercised. The question, therefore, of the power of a private corporation to lease its entire property for a term of years, resolves itself to consideration of the financial exigencies of the company concerned, as indicated by the evidence; and while no special finding of fact is made in that regard in the case at bar by the trial court, yet this feature must necessarily have been considered, in the light of the evidence introduced at the trial, and the judgment based thereon. We find ample authority in the record for the action of the court below in this respect, and following the rule so often reiterated that it is unnecessary to cite authorities to sustain it, we must hold that where the record contains some evidence to support the finding of the trial court, the judgment will not be disturbed in this court on appeal.

The second proposition contended for, however, involves the consideration of another and far more important question, which it becomes the imperative duty of this court to pass upon. Does the contract, or so much thereof as is set out above, tend to the unlawful restriction of competition in the business it concerns, and thereby furnish an illegal monopoly of said business in the cotton growing communities, and this, in contemplation of the character of the transactions out of which the contract grew, the plan and mode of operation of the business of the purchasing or leasing company, and the objects or results accomplished, if not in fact intended or sought to be brought about? When a contract is brought before us for construction and adjudication, its validity is necessarily involved, and is usually the first point to which the attention of the court is challenged by counsel. In construing the instrument here, as well said by Mr. Justice Bradley, in *Oregon Steam Navigation Company v. Winsor*, 20 Wall. (U. S.) 64-68, 22 L. Ed. 315, it must be "judged according to the circumstances, and can only be rightly judged when the reasons and grounds of the rule of construction of such contracts are carefully considered." The public welfare is the first consideration to which the courts will look, and then the question of whether the restraint upon the

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one party is or is not greater than the protection of the other requires. It is now the general holding that when one engaged in any business or occupation sells out his stock in trade and good will, he may make a valid contract with the purchaser binding himself not to engage in the same business in the same place for a time named, and this is about as far as contracts in restraint of trade have been upheld by the court in this country or in England. But when, by the principal operation of any contract, it encroaches upon the rights of the public and transgresses the liberty of free competition, consideration then for the public welfare and for society becomes paramount, and must predominate over any individual right to contract. It is immaterial in determining the legality of such contracts whether or not it was entered into with any evil intent, but the material consideration is its injurious tendency, and the power thereby given to control prices. Nor, in order to vitiate a contract, is it essential that its result should be a complete monopoly. It is sufficient if it really tends to that end, and to deprive the public of the advantages derived from free competition.

No one can read the contract in the case at bar, and fail to discover that considerations of public policy are largely involved. The intention of the agreement is to aid in securing the objects sought to be attained in the formation and organization of the Gulf Compress Company and its allied corporation, the Atlanta Compress Company; and that this object is to prevent competition in the compression of cotton throughout the cotton producing states cannot reasonably be doubted. Circumstances so strong that it is impossible not to give this interpretation to them point unerringly to this conclusion. It crops out time and again both in the language used during the negotiations for the lease of the Shawnee Compress Company's plant and in the contract itself, and in the testimony introduced on the trial below. True, the language is guarded, the parties are circumspect; it is only sought to "discourage unnecessary and unreasonable competition," but such language is to be taken and construed in the light of the actions of the parties, and in view of the attendant circumstances. The Gulf Compress Company is in the

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business of compressing cotton for hire. Its field of operation is as broad as language can make it. Its capital is \$1,000,000, of which six-tenths or \$600,000 remains in the treasury in the shape of treasury stock, the form most convenient, most immediately available for instant application. Its capital has within the past 18 months been increased from \$25,000, to an amount sufficient to buy or otherwise absorb almost all, if not the entire business of cotton compression conducted in the United States. It, with the Atlanta Company now controls the operation of 52 compresses, out of which it owns but 6, holding the remainder by lease contracts, as testified to by the president of both companies, similar to that under consideration here. The officers of neither of these companies have seen fit to declare a single dividend since their incorporation, but the surplus earnings of both companies are held in the corporation vaults, for the very purpose, as we may well infer from the surrounding circumstances, of [318] increasing its holdings of such properties under like contracts, in furtherance of a general policy to absorb the entire business of compression of this commodity. The real, the veritable purpose actuating the officers of the Gulf Compress Company, as disclosed by its plan of organization and mode of operation, and as manifested by the circumstances surrounding the conduct of its business and the results of its management by them, is, beyond reasonable question, to place within their power the control of the compress industry, by purchasing or leasing those plants which are advantageously located in each of the hauling districts or territories established by the carriers in their cotton tariffs. Within certain boundaries, the haul must be one certain way, and when the Gulf Company seizes the strategic point, under its leases, competition within that district is annihilated. If it be true, as declared upon the witness stand by its president, that such is not the purpose of this organization, then the intention of its officers, as evinced in the declarations which fall from their lips, is at wide variance from the purposes evidenced by the results they have brought about. Nowhere by the terms of the contract we are construing is the Gulf Compress Company obligated to continue the Shawnee plant

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in operation as an active factor in the cotton compress business. Its machinery might lie idle, its industry cease, for all the contract obligates them to the contrary. The territory within which the restriction on the Shawnee Company is to operate is practically unlimited. True, the agreement is that it "shall not directly or indirectly engage in the compression of cotton within fifty miles of any plant operated by the Tenant," but, under this clause, the Gulf Company may establish a compress at any competitive point it pleases, and thereby wholly extinguish competition through those companies bound by its leases; and if with a few, why not with all, until the logical outcome is the establishment of a monopoly of that business throughout the cotton producing area, the closing of every avenue to competition, under leases identical with that under consideration here.

The cases cited by counsel for the defendants in error do not sustain the doctrine contended for by them. This case does not fall within that class of cases where contracts have been upheld, though the parties, by the contract, were restrained from carrying on the same business for a particular length of time and within a designated territory, but is one of that class which depend for their validity upon the situation of the parties, the nature of the business, the interests touched by the restrictions, and the effect of the contract upon the rights and welfare of the public. Tested by the general principles applicable to contracts of this character, this agreement is far more extensive in its outlook, and more onerous in its intent than is necessary to afford a fair protection to the lessee. And tested by the same principles, because of the considerations hereinbefore mentioned, it is equally clear that the obligation is in general restraint of trade, opposed to public policy, and pursued to its logical outcome, tends necessarily to the establishment of a monopoly, and is therefore, to that extent, void.

We have examined numerous decisions in the investigation of this subject, and believe that the conclusion we have reached is the one most closely following the trend of modern authority, and in entire accord with the latest judicial expressions and enunciations of the principles governing such con-

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tracts. In our judgment, not only is the enterprise in which the Gulf Compress Company is engaged an unlawful one, as now conducted, but the contract in question in this case, being made to further its objects and purposes, is void on the ground that it is in unreasonable restraint of trade, and against public policy. Some of the cases which construe contracts of similar character are: *Field Cordage Co. v. Nat'l Cordage Co.*, 6 Ohio Cir. Ct. R. 615; *Richardson v. Buhl et al.* (Mich.) 43 N. W. 1102, 6 L. R. A. 457; *Rakestraw v. Lanier* (Ga.) 30 S. E. 735, 69 Am. St. Rep. 154; *Lawrence v. Kidder*, 10 Barb. (N. Y.) 641; *Althen v. Vreeland* (N. J. Ch.) 36 Atl. 479; *Consumers Oil Co. v. Nunnemaker*, 142 Ind. 560, 41 N. E. 1048, 51 Am. St. Rep. 193; *Bingham v. Maigne*, 52 N. Y. Super. Ct. 90; *Thomas v. Adm'r of Wm. Miles, Dec'd*, 3 Ohio St. 275; *Western Wooden Ware Ass'n v. Starkey et al.*, (Mich.) 47 N. W. 604, 11 L. R. A. 503, 22 Am. St. Rep. 686; *Small v. Minn. Electro Matrix Co. et al.* (Minn.) 47 N. W. 797; *Dodge Stationery Co. v. Dodge* (Cal.) 78 Pac. 879; *Roberts v. Lomont*, 102 N. W. (Neb.) 770; *Evans v. Am. Strawboard Co.*, 114 Ill. App. 450; *Texas Standard Cotton Oil Co. v. Adoue*, 19 S. W. (Tex. Sup.) 274, 15 L. R. A. 598, 29 Am. St. Rep. 690, and many others. In the case of *Field Cordage Co. v. Nat'l Cordage co.*, *supra*, a lease for a term of years was made by a manufacturing company of the machinery in the mill of another like company, together with the latter's good will, but the lease failed to make provision for the operation of the mill where situated, and such lease was held void as in restraint of trade. The case of *Richardson v. Buhl et al.*, above cited, involved the consideration of a contract for the purchase of the entire property of a manufacturer of matches, it being the policy of the purchasing company to exact from every seller a bond that such manufacturer would not for a term of years engage in or aid any one else in the manufacture of matches, "in any place where such action might conflict with the interests or diminish the sales, or lessen the profits of the purchasing corporation," and in an exhaustive opinion, Sherwood, C. J., held that such contract was "unlawful and against public policy, the object being [319] to prevent competition and control the price of an article of necessity." The contract construed in

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the case of *Thomas v. Adm'r of Wm. Miles, supra*, was similar in its provisions to the one at bar, the seller binding himself "not to enter into nor be concerned in the kind of business which has hertofore been conducted or carried on by the said firm, or any branch thereof, within the city of Cincinnati and shall not in any way interfere with any agency established by said firm, whether such agencies shall be located in Cincinnati or elsewhere," and upon appeal such contract was held to be "clearly opposed to public policy and therefore void." Again in the case of *Dodge Stationery Co. v. Dodge, supra*, under a statute almost identical with ours, excepting from the general operation of the law as to contracts in restraint of trade those concerning the selling of good will of the business, it was held that a contract by a vendor of stock in a corporation, binding him not to engage in the line of business conducted by the corporation, is void. And that occurs in the case at bar, since by the terms of the contract, the Shawnee Compress Company, and its officers "individually and collectively" bound themselves not to engage in the compress business in a territory practically unlimited. See, also, *Santa Clara Val. M. & L. Co. v. Hayes*, 76 Cal. 387, 18 Pac. 391, 9 Am. St. Rep. 211; *Pacific Factor Co. v. Adler*, 90 Cal. 110, 27 Pac. 36, 25 Am. St. Rep. 102; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *Clancy v. Onondaga Fine Salt Co.*, 62 Barb. (N. Y.) 395; *Arnot v. Pittson, etc., Coal Co.*, 68 N. Y. 558, 23 Am. Rep. 190; *Central Ohio Salt Co. v. Guthin*, 35 Ohio St. 666; *Shute v. Heath*, 42 S. E. (N. C.) 704; *Slaughter v. Coal, etc., Co.*, 47 S. E. 247, 65 L. R. A. 342, 104 Am. St. Rep. 1013.

In view of the evidence in the record before us, we can not judicially determine that any portion of the lease contract involved in the case at bar would unquestionably have been entered into, regardless of the two provisions hereinbefore quoted, and herein held unlawful; hence, the entire contract must fall. *Western Wooden Ware Ass'n v. Starkey et al.* (Mich.) 47 N. W. 604, 11 L. R. A. 503, 22 Am. St. Rep. 686; *Bishop v. Palmer*, 16 N. E. (Mass.) 299, 4 Am. St. Rep. 339; *Wilson's Ann. Sts.* § 767. In view, then, of the evident purposes of the leasing company, as indicated by its plan of organization, its abundant available treasury stock, its con-

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trol, together with the Atlanta Company, of 52 compresses scattered at various points over the Southern states, the area affected, the unlimited operation of the restraining clause, the general situation and the interests concerned, considerations of public welfare and regard for the public interests in the communities affected, require us to hold that this lease is wider in scope and more restrictive in operation than necessary for the proper protection of the Gulf Compress Company in its lease, and being executed in furtherance of a monopolistic design inimical to the best interests of the public is in unreasonable restraint of trade, and therefore void.

In view of the conclusion we have reached upon the second assignment of error, discussion of the remaining questions urged would serve no good purpose.

For the reasons above given, the judgment of the trial court is reversed, and this cause is hereby remanded to the district court of Pottawatomie county, with instructions for that court to render judgment in favor of the plaintiffs below in conformity with this opinion and the prayer of their amended petition.

BURWELL, J., who tried the case below, not sitting. All other justices concurring

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[819] R. J. REYNOLDS TOBACCO CO. v. ALLEN BROS. TOBACCO CO.

(Circuit Court, W. D. Virginia. March 20, 1907.)

[151 Fed. Rep. 819.]

TRADE-MARKS AND TRADE-NAMES—SUIT FOR UNFAIR COMPETITION—DEFENSES.—The claim that a conveyance by one manufacturing corporation to another of all its property, including its trade-marks, trade-names, brands, and labels, contains a provision in violation of the Anti-Trust Law of the United States, is not available as a defense by another manufacturer when sued for infringement or unfair competition in respect to a trade-mark, brand, or label, where it is shown that the same has been contin- [820] uously used by the grantee as its own, since a time prior to the commencement of the alleged infringement or unfair imitation.\*

[Ed. Note.—Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare et al. v. Harper & Bros.*, 30 C. C. A. 376.]



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**SAME—UNFAIR COMPETITION—SIMULATION OF DRESS.**—Complainant and its predecessors in business from about 1880 made and sold a brand of plug tobacco known as "Schnapps," and in 1894 commenced placing upon the plugs tin tags of rhomboid shape, and having a dark background with the word "Schnapps" thereon in red letters slanting backward, which tag, as shown by the evidence, was novel and distinctive. During the following 12 years nearly 800,000,000 of such tags were used, and also several millions of advertisements, hangers, etc., were sent out having thereon pictures of such tag which came to be known throughout the Southern states as the distinctive mark of the Schnapps brand. Many of the retail customers were unable to read, but identified complainant's tobacco entirely by the tag, and the size and shape of the plug. Later defendant put upon the market a cheaper grade of tobacco in plugs of the same size and shape, and with tags thereon of the same size, shape, style, and colors; the only difference being in the name which was "Traveller" instead of "Schnapps," which difference could not be distinguished at a short distance. The evidence showed that the simulation was intended to, and did in fact, deceive customers who intended to buy complainant's product. *Held*, that such simulation constituted unfair competition and entitled complainant to an injunction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 81.]

In Equity.

*Frank F. Reed*, for complainant.

*Caskie and Coleman*, for defendant.

PRITCHARD, Circuit Judge.

This suit was instituted in March, 1906, and seeks to enjoin the defendant from unfair and fraudulent competition. Both the complainant and defendant are engaged in the business of manufacturing smoking and chewing tobacco, the complainant at Winston-Salem, N. C., and the defendant at Lynchburg, Va. Complainant is a corporation created under the laws of New Jersey, and the defendant is a Virginia corporation. The sum or value in controversy exceeds \$2,000, exclusive of cost and interest. In 1880 Richard J. Reynolds, then a manufacturer of plug tobacco, originated a formula or recipe, selected the name "Schnapps" as the trade-mark or trade-name for the product, and placed his article upon the market under that style. R. J. Reynolds was succeeded

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in business in 1888 by R. J. Reynolds & Co., a copartnership, composed of R. J. Reynolds, William N. Reynolds, and Henry Roan. In 1890 the copartnership was converted into the R. J. Reynolds Tobacco Company of North Carolina, and this company, in 1899, sold out to, and was succeeded by, the R. J. Reynolds Tobacco Company of New Jersey, the complainant. The copartnership and corporations in each instance acquired the plant, assets, property, good will, trade-names, trade-marks, trade-dress, recipes, and trade-rights of the predecessor, announced succession, preserved the Schnapps formula as a trade-secret, and continued the manufacture of the brand at the same place, and in substantially the same way under the general conduct and supervision of the originator of both the business and [821] brand. Prior to 1894, Schnapps had been marketed with the tag in various designs. In that year a new and theretofore unused style of tag was gotten up, and from that date employed for the tag, consisting of a narrow tin rhomboid, exhibiting a dark brown or black background with the word "Schnapps" imprinted thereon in red back-slanting letters. Two or three such tags, one for each cut, are placed upon each plug, and are the only badges or marks of origin or identification attached to the tobacco and accompanying it, usually seen by the consumer. The plugs with the tags attached are packed in the usual way in boxes or caddies which bear the name and address of the maker, and an enlarged reproduction of the tag upon the sides and ends. In retail stores, where the tobacco is sold to users, the caddies are usually unheaded and placed in show cases or rear shelves where but little of the letter press thereon is visible, but where the general appearance of the tag can be seen; and from such caddies the retailer passes out the plugs or cuts to the buyer. The market for this brand embraces the Southern states. The brand has been, especially since 1894, extensively advertised by signs, hangers, posters, and circulars, which usually have reproduced on an enlarged scale the peculiar identifying tag. About \$1,000,000 have been expended in advertising the brand of tobacco called 'Schnapps.' The sales have reached 11,500,000 pounds annually. The consumers are largely colored and white

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people unable to read. The tag is thoroughly associated with and in the minds of users, and identifies the product of complainant, directly or indirectly, by signifying the thing desired. Beginning in 1902, after defendant's infringement started, indented letters were used for the Schnapps tag, and to some extent advertised as identifying the genuine product. Six years after Schnapps was well established and known, and the peculiar features of the tag associated and identified with, and relied upon as a badge of origin, defendant, a rival plug tobacco manufacturer, with knowledge of the facts relative to Schnapps came upon the market with a new brand styled "Traveller," and employed a tag of same dimension, shape, and color, and the word "Traveller" inscribed thereon in red back-slanting letters. The plugs of tobacco are identical in shape, size, color, and weight with complainant's; have the tag affixed in the same places and numbers, and are packed in boxes and caddies of the same sizes. The shapes, sizes, and colors of plugs, number of cuts, and places of tags, method of packing, and sizes and shapes of boxes, are common to the trade. Traveller tobacco is inferior in quality, is sold to the trade for a less price than the brand of complainant known and designated as "Schnapps," and sold to the consumer for the same prices, and is not advertised to any extent. It is exposed for sale and sold in the same way and to the same class of consumers, and in the same markets as Schnapps.

It is insisted by the complainant that the defendants' salesmen are requested to suggest to retail dealers that the "Traveller" brand can be substituted for "Schnapps" with greater profit; and this has been done, and is being done. It is also insisted that it is shown by the testimony that the defendants at the suggestion of a customer by the name of Tom Morton, of Tennessee, adopted the size, color of tag, etc., and color of letterpress to enable such substitution and passing off of the [822] Traveller brand of tobacco; that the defendants' salesmen had deliberately and methodically represented to retail dealers that by similarity of the label "Traveller" brand could be palmed off on buyers as "Schnapps"; that the imitation is calculated and does de-

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ceive buyers; that the defendants have been repeatedly and cautiously warned, but have refused, to desist their conduct; that although the imitation tag has been on the market for four or five years, it is only within the last 18 months that it has been actively urged or pushed and that it was not until after the institution of this suit that the fraudulent inception of Traveller was ascertained by complainant. The injunction sought is to stay the use in the manufacture, packing, and distributing of plug tobacco, containing a tag identical or like that of complainant, or the tag used by defendants of the same style or color, style, color, or arrangement of letterpress, calculated to enable or of enabling the plug tobacco of the defendants to be substituted and passed off, and sold as the plug tobacco of complainant. It is not claimed that the Traveller brand is an infringement of the Schnapps brand as a trade-mark or trade-name. This is a suit to enjoin unfair and fraudulent competition in trade. It is insisted by counsel for defendants that there is a want of title to the Schnapps brand and tag, because of a stipulation in the conveyance from the R. J. Reynolds Tobacco Company of North Carolina to the complainant, the R. J. Reynolds Tobacco Company of New Jersey, upon the ground that the contract in question contains a clause in restraint of interstate commerce or trade, and therefore void.

The amended bill of complaint shows the inception of the business in 1880 by Richard J. Reynolds, its transfer in 1888 to R. J. Reynolds & Co.; the succession in 1890, of the R. J. Reynolds Tobacco Company of North Carolina, and the acquisition of the business by the R. J. Reynolds Tobacco Company of New Jersey in 1899. These averments, which are practically unchallenged by the answer, save that the legality or the validity of the conveyance from the North Carolina Company to the New Jersey Company is denied as violative of the anti-trust act, are amply sustained by the conveyances, of which copies are annexed to the affidavit of Richard J. Reynolds as exhibits 1 to 11, inclusive. Exhibit 1. Copartnership articles, dated January 2, 1888, between Richard J. Reynolds, W. N. Reynolds, and Henry

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Roan; the former retaining the ownership of all brands. Exhibit 2. Articles of incorporation of R. J. Reynolds Tobacco Company of North Carolina, dated February 11, 1890, showing R. J. Reynolds, W. N. Reynolds, and Henry Roan, taking all the shares of stock. Exhibit 3. Deed from R. J. Reynolds to R. J. Reynolds Tobacco Company of North Carolina, conveying the factory, fixtures, furniture, and brands. Exhibit 5. Articles of incorporation of R. J. Reynolds Tobacco Company of New Jersey dated April 3, 1899. Exhibit 6. Resolution of stockholders of R. J. Reynolds Tobacco Company of North Carolina, authorizing the directors to sell and convey as of March 21, 1899, the good will, business, trade-marks, brands, patents, trade-secrets, processes, formulas, bills and accounts receivable, real estate, factory, plant, machinery, and all assets and property of the North Carolina Company to the R. J. Reynolds Tobacco Company of New Jersey. Exhibit 7. Resolutions [823] of board of directors of North Carolina Company April 10, 1899, authorizing such transfer. Exhibits 8 and 9. Deeds of factory from R. J. Reynolds and North Carolina Company to New Jersey Company, dated January 30, and April 11, 1899. Exhibit 10. General conveyance April 11, 1899, from R. J. Reynolds Tobacco Company of North Carolina and its stockholders, to R. J. Reynolds Tobacco Company of New Jersey, conveying the tobacco manufacturing business of vendor as a going concern with all good will, personal property, chattels, trade-marks, trade-names, brands, labels, copyrights, trade-secrets, etc., and all property effects, assets, and estate of vendor. Among the registered brands scheduled as "Schnapps." Exhibit 11. Separate transfer, dated April 11, 1899, of registered trade-marks and brands, enumerating Schnapps as registered April 22, 1884. The defendant seeks to show that the complainant is not the legal owner of the Schnapps tag, and, in support of this contention, it is insisted that the conveyance from the North Carolina Company to the New Jersey Company is violative of the Anti-Trust Act.

In order to sustain the proposition contended for by defendants, it must first appear that the contract is in restraint

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of trade, and it must also appear that it is in restraint of interstate commerce or trade. It has been repeatedly held that a clause of this description in a conveyance of property which includes good will, trade-marks, trade-secrets, and letters patent, is perfectly valid, and not in restraint of trade at all, and clearly a clause of this character does not so directly affect interstate trade or commerce as to be within the statute, even if it were in restraint of trade. The questions thus sought to be raised do not apply in a suit of this character. While the court is of opinion that the evidence amply shows that the contract entered into between the R. J. Reynolds Tobacco Company of North Carolina and the R. J. Reynolds Tobacco Company of New Jersey in 1899, is not in violation of the anti-trust act, at the same time, it is admitted that the complainant is in the possession of the trade-mark "Schnapps," and the label, and that it has been in possession of the same for a long time under color of title and right. It necessarily follows that it is in the rightful possession of the same. It is a well-settled principle that, as against a trespasser, possession of the premises is sufficient.

The tag which is asked to be protected having been adopted in 1894, while the trade-mark Schnapps was owned by the R. J. Reynolds Tobacco Company of North Carolina, and it appearing that all of the business and assets have been transferred to complainant, this would be sufficient without a specific assignment of the trade-mark to give complainant a perfect title to all rights pertaining to the tag. *Pillsbury v. Pillsbury-Washburn F. Mills Co.*, 64 Fed. 841, 12 C. C. A. 432; *Prince Co. v. Prince Co.*, 57 Fed. 938, 6 C. C. A. 647; *Kidd v. Johnson*, 100 U. S. 617, 25 L. Ed. 769; *Howie v. Chaney*, 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149. The evidence shows that Schnapps tag has been constantly used and employed since April, 1899, by complainant and such use was long prior to the adoption of the Traveller tag. It thus appearing that the North Carolina Company has ceased to use the Schnapps tag, under these circumstances the complainant acquired title to the same independent of any conveyance that may have been [824] made to it by the North Carolina Company. *Baking Powder Co. v. Raymond* (C. C.) 70 Fed. 376, two cases.

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The court will now consider the question whether the adoption of the Schnapps tag in shape, size, and color of same were in combination new, peculiar, and distinctive.

The verified bill of complaint on page 6, among other things, alleges:

"In the year 1894, while the said R. J. Reynolds Tobacco Company of North Carolina was the owner and proprietor of said business, and was engaged in the manufacture, exploitation, and sale of plug tobacco under said secret formula and recipe at said plant and place, and employing the said trade-mark and trade-name thereon, said R. J. Reynolds Tobacco Company of North Carolina did devise, and therethrough use and employ, in connection with said trade-mark and trade-name, Schnapp, a new, peculiar, original, and theretofore unused tag exhibiting a new, peculiar, original and theretofore unused form and combination of color, shape, and size, and color, and style of letterpress, wherein the word 'Schnapp' was printed in red back-slanting letters upon a very dark or black tin tag of rhomboidal form. Said form of letterpress, and color of type, and color and form of tag were new, original, striking, and distinctive, and not theretofore used or employed upon or in connection with plug tobacco."

R. J. Reynolds says in his affidavit:

"When, in 1894, the Schnapp tag was changed and the present style adopted, this style, so far, as I then knew, or now know, was absolutely new and original. I had been selling, manufacturing and dealing in plug tobacco at that time for a period of over 20 years, and was well posted as to the style of tags employed. Prior to that time, I never saw or heard of a tag of this description; that is, an elongated lozenge or parallelogram, with slanting ends, dark background, and the name of the brand in red letters inscribed thereon. This tag was devised for the express purpose of identifying and distinguishing the manufacture of the R. J. Reynolds Tobacco Company, and from the beginning was extensively advertised for that very purpose."

W. V. Birchfield, after stating that he has known the Schnapps brand for 12 or 14 years, says:

"The tag in its present form was adopted in 1894. When I first became acquainted with the brand, it was new and distinctive, and I cannot remember of ever having seen anything like it on plug tobacco."

Tom Morton, who has been in the tobacco business in the South since 1889, and is familiar with brands, says:

"When I first saw the Schnapps tag, it was to me new, peculiar, and distinctive in shape and colors, and was, so far as I know, new and peculiar to the R. J. Reynolds Tobacco Company."

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**W. Z. Stultz says:**

"I am well acquainted with the Schnapps brand, and knew it prior to 1894, when the present form of label was adopted. So far as I know, the combination of shape of label, color of label, and color and slant of letters, was new and original."

**George P. Cornell, Jr., says:**

"I have known Schnapps brand since about 1894. In 1894 a new tag of the present form was adopted. Prior to that time I never saw a similar tag."

**R. U. Falkner says:**

"That the present form of Schnapps, when adopted in 1894, was new and original, and affiant had never seen anything like it before."

[1825] W. T. Brown, of Brown Bros. Company, is familiar with plug tobacco brands and has known Schnapps since its appearance on the market, and knew of the new tag adopted in 1894, and says:

"That at the time of the adoption and placing upon the market of the present Schnapps tag, its design and combination of shape, color, and color of letters a distinctively original and new tag."

Geo. T. Brown, president of Brown & Williamson Tobacco Company, of Winston-Salem, N. C., who has been manufacturing and selling plug tobacco in Southern states for 12 years, and who has known the brand Schnapps since put on the market says:

"The tag adopted in 1894, was in design and combination of shape, color, and color of letters, new and original."

E. M. Bohannon, of Winston-Salem, has been a manufacturer and seller of plug tobacco in the South for 18 years and has known Schnapps from its origin, gives the same evidence as to the newness and originality of the Schnapps tags. W. A. Whitaker, of Winston-Salem, who has made and sold plug tobacco for 25 years, says the same thing. So do J. P. Taylor, a member of the firm of Taylor Bros., manufacturers, and C. D. Ogden, of Ogden Hill & Co., both of Winston-Salem, after an experience as a manufacturer of plug tobacco of 25 years' duration. The peculiar and distinctive tag for Schnapps has been extensively advertised and used, and is now thoroughly associated with and identifies



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the R. J. Reynolds Tobacco Company's product. Bill of complaint (page 96) affidavit of Richard J. Reynolds, and exhibits thereto. The evidence shows that over 783,676,524 tags have been used upon the plugs sold since 1894. This advertisement and association of the peculiar and distinctive tag as a badge of identification is stated in the bill of complaint, and abundantly sustained by the proof.

R. J. Reynolds says:

"It is safe to say that since the adoption of the new form of Schnapps tag in 1894, the R. J. Reynolds Tobacco Company of North Carolina and the R. J. Reynolds Tobacco Company of New Jersey, has expended the sum of \$1,000,000 in advertising Schnapps tobacco, of which sum the advertising matter which reproduced the Schnapps tag. During the same period 83,773,776 pounds of Schnapps, bearing 783,676,524 tags, have been sold."

The exhibits of advertising matter reproducing the 1894 Schnapps tag are exhibit 13, May 6, 1901, 50,000 copies; Exhibit 14, May 15, 1901, 25,000 copies; Exhibit 15, August 17, 1901, 50,000 copies; Exhibit 16, March 20, 1902, 100,000 copies; Exhibit 17, store signs, showing caddies and tag; April 19, 1902, 50,000; October 8, 1902, 50,000; Exhibit 18, April 11, 1902, 20,000 copies; Exhibit 19, July 19, 1902, 50,000 copies; October 16, 1902, 50,000; February 2, 1903, 100,000; April 6, 1903, 50,000; Exhibit 20, June 20, 1903, 50,000 copies; August 19, 1903, 50,000 copies; Exhibit 21, November 14, 1903, 42,000 copies; Exhibit 22, April 20, 1904, 100,000 copies; Exhibit 23, February 16, 1904, 100,000 copies; Exhibit 24, January 30, 1904, 500,000 copies; Exhibit 25, April 30, 1904, 100,000 copies; Exhibit 26, before 1900; Exhibit 27, before 1900; Exhibit 28, issued 1901; Exhibit 29, prior to 1900; Exhibit 30, issued in 1898 or 1899; [826] Exhibit 31, issued several years since; Exhibit 32, 1895 or 1896; Exhibit 33, issued in 1901. These signs and hangers were distributed all over the South. In 1899, Exhibit 34, showing Schnapps tag on cover was extensively distributed. In March, 1903, Exhibit 35, a pamphlet, showing tag reproduction was issued to the extent of 1,000,000 copies. Keeping in mind the enormous sales, and that all of the mass of advertisement was of a permanent character, and hung up in public places, and that the prominent and

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striking features were in most instances of advertising, and in all instances of sales, the tag itself, it necessarily follows that the tag, original, individual, and peculiar, became closely associated with the product in the minds of buyers.

W. V. Birchfield says that the tag from its adoption has served to identify the tobacco, and adds:

"From the earliest date of my experience, the people identified the product by the peculiar shape and style of this tag. I know there are thousands of people in my territory who chew Schnapps, and identify it by the shape and color of the tag without being able to read the word Schnapps."

Tom Morton, after stating that he has noticed throughout the South for a great number of years the advertisements reproducing the tag, says:

"Beyond question this peculiar tag is thoroughly identified with and identifies and designates the tobacco of the Reynolds Company, and the people rely on the shape, color, and arrangement and the general appearance of the tag as identifying that tobacco, as well as the word 'Schnapps' itself. This is particularly true of many of the consumers of plug tobacco. Of these a great many are ignorant people who cannot read, and who depend upon not the printed name, but simply the general appearance of the tag as identifying the tobacco asked for."

W. Z. Stultz says:

"I know that this label in its general appearance is thoroughly identified with the Schnapps brand of tobacco, and is relied upon by purchasers as identifying the thing that they want."

Geo. P. Cornell, Jr., says:

"I know that the people rely on the general appearance of this tag as identifying the goods."

In order to properly determine the merits of this controversy, it is well to understand what it takes to constitute unfair and fraudulent competition in trade. The complainant seeks to enjoin the defendant from the use of a tobacco tag known and designated as "Traveller," which it alleges has been used by the defendant in an unfair and fraudulent manner in the manufacture and sale of plug tobacco. The title of complainant to the Schnapps tag is clearly established, as will appear by the statement of facts in this cause. It appears from the evidence that Geo. T. Brown, Wm. T.

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Brown, F. M. Bohannon, W. O. Whitaker, J. B. Taylor, and C. D. Ogburn, rival manufacturers, and not all interested in the result of this suit, without exception, state that, owing to the extensive reproduction of the tag in advertising Schnapps brand and tag it had become generally understood on the part of the public as well as dealers that the Schnapps brand was and is associated and identified as the product of the R. J. Reynolds Tobacco Company. [827] The extensive advertising of this particular brand, and the familiarity with the tag on the part of the public, and the further fact that complainant's goods are known and identified thereby, will be presumed in law from the undisputed facts shown by the testimony as to extensive advertising, long use, and extensive sale.

*The New England Awl Co. v. Marlborough Awl Co.*, 168 Mass. 154, 46 N. E. 386, 60 Am. St. Rep. 377, was a suit for the protection of a bronze colored box. The court, among other things ruled:

"The report states that it did not appear whether or not any purchaser of awls had learned to recognize the plaintiff's awls by the appearance of the packages. This cannot mean more than that there was no direct testimony to that effect. But the fact that the plaintiff had used the combination since 1885, and largely since 1893, is enough to raise a presumption in its favor. *McAndrew v. Bassett*, 4 De Gex. J. & S. 380."

It appearing that the Schnapps style of label is identified with complainant's product and that it has a trade or secondary meaning, it will in equity be protected from imitation. The theory upon which the ruling in cases like this is based is that where one adopts a means of advertising, new and peculiar, and has extensively advertised and used the same for a considerable period of time that he thereby becomes the owner of the good will and particular trade in which he is engaged and no one can legally by fraud or falsehood deprive him of the proprietary interest thus acquired, and it being made to appear to the satisfaction of the court that the right thus acquired is being interfered with by trick, artifice, fraud, or falsehood by those who come in competition with him in the sale of his product, a court of equity will by injunction prevent such interference upon the ground that it constitutes unfair and fraudulent competition in trade.

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The following cases clearly establish the principle that if a manufacturer has adopted a new, peculiar and distinctive label, for the purpose of designating his goods, and the evidence shows that he has used it—his goods being identified by it—a court of equity will restrain another party from adopting and using a similar label arranged so as to mislead purchasers who exercise ordinary care in the purchase of such articles.

In *Morrison v. Case*, 9 Blatchf. 548, Fed. Cas. No. 9,845, in speaking of the name and figure of a star employed in connection with shirts, it was said:

"Though this device or mark is in part arbitrary and, to that extent, would have no natural or necessary significance in that connection with the article manufactured, apart from its use in that connection, yet, by such use of the plaintiffs' in connection with their manufacture and sale of these articles, it has become well known to the trade, and has come to be taken by dealers as a peculiar designation by which the plaintiffs' goods are distinguished in the market. It is therefore, both in its character and use, when taken together, a lawful trade-mark. It has long been employed by the plaintiffs, and well understood, by dealers and the public, as designating such articles of their manufacture."

In *Anheuser-Busch Brewing Ass'n v. Clarke* (C. C.) 26 Fed. 410, it was said in reference to a red diagonal band or label used upon a bottle of beer:

"The general rule of law applicable to this case is that, if a manufacturer has applied a peculiar and distinctive label to designate his goods, and has [828] so used it that his goods are identified by it, a court of equity will restrain another party from adopting and using one so similar that its use is likely to lead to confusion by purchasers exercising the ordinary degree of caution which purchasers are in the habit of exercising with respect to such goods. *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828. The complainant's affidavits show that the complainant was the first to use for bottled beer a label with a diagonal red band, with the name of the kind of beer appearing in white letters on the red band, and that he had been habitually using this label for two years. The label is very noticeable and distinctive; one by reason of the diagonal red band. The result of the effect upon the eye from seeing a number of bottles is that it is a beer labeled with a diagonal red band, and the more frequently one sees it the more this one effect is deepened. It does appear altogether probable that a consumer who has been accustomed to getting bottles labeled with complainant's label would more and more rely on the diagonal

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red band as its distinctive mark, and would be likely to accept the respondent's beer with his diagonal label on it as supplying what he was in the habit of getting. There is nothing in the differences in the labels calculated to counteract this; and, I think, it is a strong case of a similarity likely to deceive."

In *Hires Co. v. Consumers Co.*, 100 Fed. 809, 41 C. C. A. 71, where the defendant had first adopted, advertised, and used for root beer a certain form of bottle, it was said:

"It was proven that the complainant's root beer was principally known to and recognized by consumers from the peculiar form of bottle. It was this distinguishing feature which caught the eye, and abided prominently in the memory. Indeed, the court below declared in its opinion that the changes made by the defendant in its label tended to deceive, 'when taken in connection with the shape of the bottle,' thus clearly recognizing the fact that the form of the bottle employed was an effective factor in the deception practiced."

In case of *Elgin National Watch Co. v. Illinois Watch Co.*, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 865, where the controversy was over the word "Elgin" as a trade-mark, it was held incapable of protection as a trade-mark, but the court declared:

"But when an alleged trade-mark is not in itself a good trade-mark, yet the use of the word has come to denote the particular manufacturer or vendor, relief against unfair competition or perfidious dealing will be awarded by requiring the use of the word by another to be confined to its primary sense by such limitations as will prevent misapprehension on the question of origin. In the latter class of cases such circumstances must be made out as will show wrongful intent in fact, or justify that inference from the inevitable consequences of the act complained of. *Lawrence Manufacturing Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997; *Coats v. Merrick Thread Co.*, 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847; *Singer Mfg. Co. v. June Mfg. Co.*, 168 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118."

In *Walter Baker & Co. v. Puritan Pure Food Co.* (C. C.) 139 Fed. 680, it is said:

"Evidence has been introduced to show that complainant has constantly used its trade-mark or emblem since about 1875, and at enormous expense has thus advertised its product in the leading newspapers and periodicals published throughout the United States and Canada. As a natural result thereof, complainant's appropriation, not only attracted the attention of the public generally, but was the means of identification of its chocolates and cocoa by the consumer.

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That such chocolate and cocoa is frequently purchased and designated by the buyers as 'the cocoa with the picture of the woman or girl,' or 'the chocolate with the picture of the lady,' is abundantly established by the evidence. Hence, it cannot be successfully controverted that complainant's chocolate and cocoa, irrespective of the words 'Walter Baker & Co.' printed upon [829] the labels, became and were distinctly known and identified by its trade-mark. The full enjoyment of such reputation and means of identification by complainant is unmistakably entitled to protection. The fact that its product is also known or identified by the name of 'Baker,' or 'Walter Baker's Chocolate or Cocoa,' is not material. The purchaser is entitled to receive the commodity which he desires and intends to buy, although other persons may know it by different marks of identification or accessories."

In the case of *Johnson v. Seabury & Johnson* (N. J. Ch.) 61 Atl. 5, it is said:

"Every case of this class must be dealt with according to the facts in each, having in mind the rights of the public as well as those of the parties. In the case under consideration the complainant, by conspicuous and continued use of, and by extensively advertising its goods under, the red cross symbol, so impressed the public that it came to rely upon the red cross as indicating complainant's goods, and to look upon the red cross symbol as an indicia of origin; and from this grew the habit of the consumer, when desiring complainant's goods, to call for 'Red Cross Cotton,' as in a similar manner was supplied the word 'Angostura' in *Seigert v. Finlater*, 7 Ch. Div. 801, so that, by the act of the public these words became the usual designation of the article, which the court will protect. *Levy v. Waitt*, 61 Fed. 1008, 1011, 10 C. C. A. 227, 25 L. R. A. 190."

The Schnapps brand is not claimed by complainant to be a trade-mark, nevertheless complainant is entitled to protection against any imitative device or style of dress which enables the substitution of another's product.

In the case of *Shaver v. Heller & Merz Co.*, 108 Fed. 825, 48 C. C. A. 48, 65 L. R. A. 878 (Circuit Court of Appeals, Eighth Circuit), Judge Sanborn, who delivered the opinion of the court, in discussing this proposition, among other things, said:

"Another proposition of counsel for the appellants is that the appellee has, and can have, no proprietary interest in the word 'American,' or in its exclusive use; and therefore it is entitled to no injunction to restrain its use by another. But an ownership, and an interest in the means by which a fraud or wrong is about to be committed are not essential to the maintenance of a suit to enjoin

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its perpetration. A title to the property about to be injured is sufficient. One gathers the seeds of pernicious weeds, and threatens to sow them on the field of his neighbor. The latter has no proprietary interest in the seeds; but he owns the field, and the crop it is producing, and these facts are sufficient to warrant any court in granting him summary relief by injunction against the threatened injury. The appellants scatter throughout the land for the purpose of deceiving the public and diverting to themselves the trade, custom, and the good will of the appellee, words and names which convey false statements that the goods they are selling were made by the Heller & Merz Company. That company has no property in the words or in the means by which this fraud is committed, but it owns the good will—the custom—which the false and fraudulent use of these words and names injures and destroys; and its proprietary interest in this good will is ample to warrant the court in enjoining its destruction by the fraud. The contention of counsel for the appellants here is a confusion of the basis of two classes of suits—those for infringements of trade-marks, and those for unfair competition in trade. Suits of the former class rest on the ownership of the trade-marks. Suits of the latter class are founded upon the damage to the trade of the complainants by the fraudulent passing of the goods of one manufacturer for those of another. In the former, title to the trade-marks is indispensable to a good cause of action; in the latter, no proprietary interest in the words, names, or means by which the fraud is perpetrated is requisite to maintain a suit to enjoin it. It is sufficient that the complainant is entitled to the custom—the good will—of a business, and that this good will is injured, or is about to be injured, by the [880] palming off of the goods of another as his. *Lee v. Haley*, 5 Ch. App. 155; *Flour Mills Co. v. Eagle*, 86 Fed. 608, 30 C. C. A. 386, 41 L. R. A. 162; *Coats v. Thread Co.*, 149 U. S. 562, 13 Sup. Ct. 988, 37 L. Ed. 847; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118.”

In *Reddaway v. Banham*, 13 R. P. C. 218, a suit was instituted for the purpose of securing protection for the words “Camel Hair” which were used as the name of belting which constituted about 60 per cent. of camel hair. The evidence in that case showed that the words “camel hair” had by long use by the complainant acquired a secondary meaning and to signify his goods. The court, in discussing this proposition, said:

“I think the fallacy lies in overlooking the fact that a word may acquire in a trade a secondary signification differing from its primary one, and that if it is used, to persons in the trade who will understand it, and be known and intended to understand it in its secondary sense, it will none the less be a falsehood because in its primary sense it may be true.”

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And, in discussing the doctrine of unfair competition in trade, the court said:

"I have often endeavored what I am going to express now (and probably I have said it in the same words, because it is very difficult to find other words in which to express it), that is, that no man is entitled to represent his goods as being the goods of another man; and no man is permitted to use any mark, sign or symbol, device or other means, whereby, without making a direct false representation of himself to a purchaser who purchases from him, he enables such purchaser to tell a lie, or to make a false representation to somebody else who is the ultimate customer."

In the case of *Coats v. Thread Co.*, 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847, it is said:

"There can be no question of the soundness of the plaintiffs' proposition that, irrespective of the technical question of trade-mark, the defendants have no right to dress their goods up in such manner as to deceive an intending purchaser, and induce him to believe that he is buying those of the plaintiffs. Rivals manufacturers may lawfully compete for the patronage of the public in the quality and price of their goods, in the beauty and tastefulness of their inclosing packages, in the extent of their advertising, and in the employment of agents, but they have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals."

Counsel for defendant cite the case of *Coats v. Thread Co.*, 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847, in support of their contention, but a careful reading of the same shows that, instead of sustaining the views urged by the defendant, it rather tends to support the theory upon which this suit was instituted. Counsel for defendant also rely upon the case of *Centaur Co. v. Marshall*, 97 Fed. 791, 38 C. C. A. 419, the court said:

"The intention on the part of an alleged infringer to induce purchasers through the use of simulated trade-mark or dress, to buy his goods under the belief that they are another, furnishes no ground for relief, unless the similarity between the two trade-marks is of character to convey a false impression to the public mind, \* \* \* and to mislead and deceive the ordinary purchaser."

In that case it was held that, while there were elements in both labels that were common, yet inasmuch as there were many distinguish- [831] ing elements, and each manufacturer put its name on the labels, so that any one who desired to



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look and see could do so, that was sufficient. Relief was denied. It necessarily follows from the quotation in the case, *supra*, if the labels had been without distinguishing features save the name employed, a different conclusion would have been reached by the court. In the case at bar the defendant adopted and used a simulated trade-mark or dress which was calculated to convey a false impression to the public mind, "and to mislead and deceive an ordinary purchaser."

Again, in the case of *Heide v. Wallace & Co.* (C. C.) 129 Fed. 649, and *Id.*, 135 Fed. 346, 68 C. C. A. 16, relied upon by counsel for defendants. In the former case, it is said:

"This device stamping or embossing the monogram has been employed for the purpose of marking their goods by others in the same trade, including the defendants, fully as long, if not longer, than the complainant."

The language used by the court in the above paragraph is sufficient to distinguish that case from the one at bar. The evidence in that case clearly shows that the device employed in marking the goods by others than the complainant had been in use by them as long, if not longer, than the complainant. Complainant was, therefore, met at the threshold of the proceeding with an insuperable barrier which he could never overcome in a suit of this character.

Again, referring to the diamond form and lettering, the court said:

"Furthermore, except as these so-called pastilles are sold in bulk, neither the form nor the lettering is brought to the attention of purchasers until they have bought them; and while both, no doubt, even so, might aid in an intended deception, it has to be initially induced and practically accomplished by the outside of the package, as addressed to the eye of the customer, which is thus controlling."

This is sufficient to differentiate that case from the one at bar.

In the case now under consideration, the tag on the plug of tobacco may be seen when the purchase is made, and before the purchaser asks for the article. The court, in continuing the discussion, among other things, said:

"The case, in this view, is brought down to the use by the defendants of the words 'Liquorice Pastilles,' and the manner they have taken to dress their packages."

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From this quotation, it appears that the words "Liquorice Pastilles" are descriptive and in common use, and hence no right exclusive or otherwise obtainable therein; and the court, in conclusion, said:

"In the face of this demonstration, it cannot be successfully contended that the term 'Liquorice Pastille,' which has been in such long and familiar use is distinctive of the plaintiff's manufacture."

The court also said:

"It is only when he adds his name and trade-mark that we have anything that is, and these the defendants in no way imitate. Neither do they the style or coloring with which he dresses out his package. This is in mixed red and blue, set off in gilt, with the diamond trade-mark prominently displayed; while the defendant's package is predominantly yellow, with an entirely different style of lettering in red, shaded with white on a black background, with their name written below."

[832] These statements taken from the opinion in that case fully differentiate it from the case at bar, leaving the proposition upon which plaintiff relies for relief in this instance, not only unaffected, but to a certain extent sustained, thereby; the theory in that case being that the shape and size of the boxes were common to the trade, and not susceptible of a monopoly. It was also held that the boxes not being the same in coloring and marking, it was not likely that a customer of ordinary intelligence would be misled or deceived thereby.

In the opinion of the Court of Appeals, where this case was heard, the court, among other things, said:

"There is nothing whatever to suggest an attempt to catch the unwary purchaser and inveigle him into taking the one when he was seeking the other, nor could the most careless be deceived, except he was in reality unconcerned as to which he got."

The inference to be drawn from the opinion in that case is that, if the colors of the boxes labeled by defendant had been similar to those of complainant, the complainant would have been entitled to relief. The use of distinctive colors, together with the arrangement upon the exterior of the boxes, and the use of the respective manufacturers' names, were deemed insufficient by the court to justify the relief sought, upon the theory that the name "Pastille," and size of the packages

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were old and known to the trade, and the use of the same was a right that was common to all persons engaged in the mercantile business. How different are the facts in the case at bar. Here, we have a tag which has been adopted and used by the complainant consisting of a peculiar background, the use of the word "Schnapps" on slanting letters, and the tag being rhomboid in shape. This tag, as stated, has been extensively advertised throughout the country, and, as a result of which, has become identified with the particular grade of tobacco sold by complainant, and has been used by the public to such an extent that such brand has established a reputation by virtue of the means thus employed to identify and advertise the same. The evidence shows conclusively that the R. J. Reynolds Tobacco Company conceived the idea of placing upon the market a certain grade of tobacco stamped with the word "Schnapps" as a means of identifying and advertising the same. It appears that about \$1,000,000 have been expended by this company in advertising this particular product; as a result of which, it has become well known and identified as a particular brand of chewing tobacco.

While the elements taken as a whole constitute entirely new and distinct features unknown to the trade prior to the adoption of this particular brand, at the same time, the different elements thus combined, when considered separate and distinct the one from the other, do not constitute an element new and unknown to the trade. Therefore, it is the result of the combination, letterpress, background, color, size and form of tag which give to the label of complainant features that are separate, new, and distinctive and which were unknown to the trade at the time of its adoption. The principle invoked by complainant is well defined, and is governed by a long line of decisions intended to secure fair and impartial dealings, among those who may seek to place their goods, wares, and merchandise on the market.

[833] The evidence of Tom Morton, residing at Memphis, Tenn., is, that while he was engaged in selling the product of the defendant that the brand of Traveller was adopted solely with the view of enabling the defendant to find a

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ready market for this kind of tobacco which the defendant at that time was exceedingly anxious to introduce as a new brand of tobacco. The testimony of this witness shows that it was agreed that a tag should be used of the same size, color of background, type, and peculiar slant of letters as that of Schnapps brand, the only difference being that the word "Traveller" instead of "Schnapps" was to be used on the new brand.

The question involved in this controversy, not only affected the rights of the parties, but the public also. The public, as well as individuals, is entitled to protection from those, who by unfair means and methods seek to palm off an article which is not what it is represented to be. The evidence shows conclusively that the brand known as "Traveller" is an inferior grade of tobacco, sold at wholesale, at a much less price per pound than the Schnapps brand. The adoption of the Traveller brand enabled the defendant to secure an undue advantage over the Schnapps brand in that it was enabled to offer to unscrupulous dealers a cheaper grade of tobacco which was to all appearances of the same grade as Schnapps, labeled with a tag so similar thereto as to deceive the public into purchasing the same, believing it to be the genuine Schnapps brand of tobacco. The cheapness of the grade, and the similarity of this brand both as to shape, size, and lettering, made it possible for the defendant by these means to engage in unfair and fraudulent competition by which it could ultimately drive its competitor out of the market. The adoption of this peculiar device by the defendant enabled it to offer a persuasive argument to the retail dealer by pointing out to him the fact that here was a brand of tobacco; the plug of which was of the exact shape, size, and color, as that of the Schnapps brand, and that the brand thereon similar in shape, size, color of background, and lettering, and which could be placed upon the market at a cheaper price than the Schnapps brand, and in this way supplanting the Schnapps brand by selling what appeared to be the same tobacco at a much cheaper price.

It is insisted by complainant that most of this brand of tobacco was consumed in communities where ignorant white

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and colored persons, who, being unable to read, relied solely on the general appearance of the brand and size of the plug; but the court is of opinion that this is really not the true test, and does not deem it necessary if such were so, to make the application in this instance, in view of the fact that the similarity of the brands are such that the Traveller brand is calculated to deceive any one of ordinary intelligence who might desire to purchase the Schnapps brand. By placing plugs of the Schnapps and Traveller brands of tobacco along side each other in a storeroom with such light as stores usually have, at a distance of six or eight feet (the distance usually intervening between the place where tobacco is placed on the shelves, and the position occupied by customers), and without a magnifying glass, it would be a physical impossibility for an expert reader to distinguish the one from the other.

[834] We know by observation that the average purchaser of tobacco rarely ever takes time to examine the brand on tobacco before removing the same. The rush incident to the great amount of business that is now being transacted throughout the country renders it quite impossible for the average man to take time to closely scrutinize the brands which may be attached to a particular piece of tobacco which he may purchase. Therefore, the public has come to rely mainly upon the well-established brands for almost every article purchased, and is entitled to receive the same free from deception and fraud. Common honesty, public policy, and every consideration of fair dealing, demand that the public should be protected in this respect. This peculiar brand of tobacco, having been so thoroughly advertised by all manner of devices, through the public press, bill posters, and cards, has become so thoroughly identified as the product of the R. J. Reynolds Tobacco Company that one who desires to purchase this particular product relies exclusively on the first impression he gains when looking at a caddy of plug tobacco, and does not stop to critically examine the same in order to ascertain whether or not a fraud is being practiced upon him.

**Syllabus.**

That the means employed by the defendant are such as to mislead those who may desire to purchase the Schnapps brand of tobacco cannot be doubted; and it being further shown that the public has been misled by the means thus employed, and inasmuch as it appears from the evidence that the Traveller brand was adopted with the intent of entering into unfair and fraudulent competition with the complainant, the relief demanded will be granted.

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**IN RE CHARGE TO GRAND JURY.**

(District Court, E. D. Georgia. February 7, 1907.)

[151 Fed. Rep., 834.]

**COMMERCE—REGULATION BY CONGRESS—INTERSTATE COMMERCE DEFINED.**—"Interstate commerce" comprehends intercourse for the purposes of trade in any and all of its forms, including transportation, purchase, sale, and exchange of commodities between the citizens of different states; and if any commercial transaction reaches an entirety in two or more states, and if the parties dealing with reference to that transaction deal from different states, then the whole transaction is a part of the interstate commerce of the United States, and subject to regulation by Congress under the Constitution.\*

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, §§ 1-5.]

**MONOPOLIES—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE.**—

The essentials of a contract or combination or conspiracy in restraint of trade or commerce among the several states or to monopolize any part of such trade or commerce, inhibited by the Sherman Anti-Trust Law of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], discussed in a charge to a grand jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 85, Monopolies, §§ 8-14.]

*Alexander Akerman*, Asst. Dist. Atty., for the United States.

*Samuel B. Adams*, *George W. Owens*, and *Walter G. Charlton*, for defendants.

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*Charge to the Grand Jury.*

**SENEB, District Judge.** Gentlemen of the grand jury: I am informed by the district attorney that the most important matter for your consideration at this term is an alleged violation of what is known [835] as the "Anti-Trust Law." These laws in the United States are but the evolution of the ancient laws of our law-loving race against those monopolies which oppress the people. Monopolies are equally obnoxious to the philosophy of Thomas Jefferson and of Sir Edward Coke. The shibboleth of the former, "equal rights to all and special privileges to none," is often heard. The latter, some 350 years ago, denounced them in a definition, which may be well considered by modern jurists and modern juries. Said that great English lawyer:

A monopoly is an institution or allowance to any person or persons, bodies politic or incorporate, of or for the sole buying, selling, making, working, or using anything, whereby any person or persons, bodies politic or corporate, are sought to be constrained of any freedom or liberty that they had before, or hindered in their lawful trade.

A more modern definition of a trust declares it to be "any compact between two or more persons or corporations, affecting any article or commodity of which the public must have a constant supply, the intent and direct tendency of such an arrangement being the creation of a scarcity or the enhancement of the price."

The efforts of the people of this country to protect themselves against the injurious results of such trusts and combinations have lasted now for many years. This is true of constitutional as of statutory law. Modern state Constitutions of Illinois, Arkansas, California, Colorado, Georgia, Massachusetts, Nebraska, Pennsylvania, Texas, and West Virginia have provisions on the general subject. These provisions are usually held to be merely declaratory of the common law; that is, the law of our forefathers which has come down to us from "the time whereof the memory of man runneth not to the contrary." Monopolies first began in a large way to betray their injustice to the masses of the people in the reign of Queen Elizabeth. From the historian Hume we learn that her active reign had given occasion for distinguished services on the part of many of her subjects. Her revenues did

**Charge to the Grand Jury.**

not permit her to adequately compensate them. She therefore granted her servants and courtiers the privileges or patents of certain monopolies. These they sold to others, who were thereby enabled to raise commodities to what price they pleased, and to put "invincible restraints upon all commerce, industry, and emulation in the arts." "It is astonishing to consider," said the historian, "the number and importance of those commodities which were thus assigned over to patentees. Currants, salt, iron, powder, cards, calfskins, fells, pouldavies, ox-shin bones, train oil, lists of cloth, potashes, anise seeds, vinegar, seacoals, steel, aqua vitæ, brushes, pots, bottles, saltpeter, lead, accidents, rudiments of grammar, oil, calamine stone, oil of blubber, glasses, paper, starch, tin, sulphur, the silicate of zinc, new drapery, dried pilchards, transportation of iron ordnance, of beer, of horn, of leather, importation of Spanish wool, of Irish yarn: these are but a part of the commodities which had been appropriated to monopolists. When this list was read in the House, a member cried, 'Is not bread in the number?' 'Bread?' said every one with astonishment. 'Yes, I assure you,' replied he. 'If affairs go on at this rate, we shall have bread reduced to a monopoly before next Parliament.'" Had this earnest parliamentarian lived in the present day, he would [886] have heard much talk of what are termed the "biscuit trust," the "beef trust," the "sugar trust," and perhaps other trusts, which deal with nutritious commodities essential to the health and indeed to the existence, of mankind.

Those monopolists of Elizabeth's time were so exorbitant in their demands that in some places they raised the price of salt from 16 pence a bushel to 14 or 15 shillings. Such high profits naturally begat intruders upon their commerce, and, in order to secure themselves against encroachments, the patentees were armed with high and arbitrary powers from the council, by which they were enabled to oppress the people at pleasure, and to exact money from such as they thought proper to accuse of interfering with their patent. And, while all domestic intercourse was thus restrained, lest any scope should remain for industry, almost every species of foreign commerce was confined to exclusive companies, who



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bought and sold at any price that they themselves thought proper to offer or exact. It was inevitable that such special privileges should provoke vigorous protest from the representatives of the people in Parliament. Accordingly a bill was proposed by Mr. Lawrence Hyde, entitled "An act for the explanation of the common law in certain cases of letters patent." The term "patent," it must be understood, was there significant of a grant for a monopoly, and did not have the modern signification. Francis Bacon, who afterwards became Lord Verulam and Viscount St. Albans, and not Lord Bacon, as he is generally called, whom Pope declared "the wisest, brightest, meanest, of mankind," made haste to exclaim:

"As to the prerogative royal of the prince, for my own part, I ever allowed of it; and it is such as I hope will never be discussed. The Queen, as she is our sovereign, hath both an enlarging and restraining power. \* \* \* With regard to monopolies and such like cases, the case hath ever been to humble ourselves unto her majesty, and by petition desire to have our grievances remedied, especially when the remedy touched her so nigh in point of prerogative. I say, and I say it again, that we ought not to deal, to judge, or meddle with her majesty's prerogative. I wish, therefore, every man to be careful of this business."

Others spoke warily on the same line, for the imperious character of good Queen Bess was well known. Some men of high courage spoke plainly. Mr. Montague said:

"The matter is good and honest, and I like this manner of proceeding by bill well enough in this matter. The grievances are great, and I would note only unto you thus much, that the last Parliament we proceeded by way of petition, which had no successful effect."

Mr. Francis More said:

"I know the Queen's prerogative is a thing curious to be dealt withal; yet all grievances are not comparable. I cannot utter with my tongue, or conceive with my heart, the great grievances that the town and country, for which I serve, suffereth by some of these monopolies. It bringeth the general profit into a private hand, and the end of all this is beggary and bondage to the subjects. We have a law for the true and faithful currying of leather. There is a patent sets all at liberty, notwithstanding that statute. And to what purpose is it to do anything by act of Parliament when the Queen will undo the same by her prerogative? Out of the spirit of humiliation, Mr. Speaker, I do speak it, there is no act of hers that has been

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or is more derogatory to [887] her own majesty, more odious to the subject, more dangerous to the commonwealth, than the granting of these monopolies."

**Mr. Martin, with even higher spirit, declared:**

"I do speak for a town that grieves and pines, for a country that groaneth and languisheth, under the burden of monstrous and unconscionable substitutes to the monopolitans of starch, tin, cloth, oil, vinegar, salt and I know not what; nay, what not!

"The principalest commodities, both of my town and country, are engrossed into the hands of these blood-suckers of the commonwealth. If a body, Mr. Speaker, being left blood, be left still languishing without any remedy, how can the good estate of that body still remain? Such is the state of my town and country; the traffic is taken away, the inward and private commodities are taken away, and dare not be used without the license of these monopolitans. If these blood-suckers be still let alone to suck up the best and principalest commodities which the earth there hath given us, what will become of us, from whom the fruits of our own soil and the commodities of our own labor, which, with the sweat of our brows, even up to the knees in mire and dirt, we have labored for, shall be taken by warrant of supreme authority, which the poor subject dare not gainsay."

Notwithstanding the objurgations of her subjects, Elizabeth, by wheedling and cajoling them in a manner not altogether unfeminine, succeeded in maintaining the monopolies in behalf of her favorites, and at the expense of her people. It was not until the reign of her successor, James I, that relief to the people was afforded. In the first Parliament of this King, a Committee of Grievances was appointed, of which Sir Edward Coke was the chairman, and it is doubtless ascribable to the labors of this great lawyer that the English statute was enacted, which to this day stands in all its original vigor among the laws of England. Of this act against monopolies our own anti-trust law is intended to be the equivalent, as affecting all matters to which the legislative and judicial power of the United States may extend. The heart of man to-day is much the same as in the days of Elizabeth and James. The greed and avarice of the powerful sometimes take little thought of the losses they entail on others not so powerful. Not only do such combinations tend to destroy all healthy rivalry and competition among those who purchase or sell the products of the people, but they

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sometimes little reck the miseries and destitution inflicted on the producers themselves, the stories of whose lives are often told in the short and simple annals of the poor.

Like the Parliament of England, the Congress of the United States has enacted the present laws prohibiting modern combinations in restraint of trade. These are not the result of patents granted by a partial monarch, but they are the outgrowth of far-reaching schemes, planning combinations to seize a suitable occasion to oppress by unlawful compacts the many for the aggrandizement and enrichment of the few. The law finds its authority in the power of Congress granted by the Constitution to regulate commerce with foreign nations and among the several states. "The power to regulate," said Mr. Justice Harlan, in his dissenting opinion, in *United States v. E. C. Knight Company*, 156 U. S. 20, 15 Sup. Ct. 249, 39 L. Ed. 325, "is the power to prescribe the rule by which the subject regulated is to be governed. It is one that must be exercised, whenever necessary, through the territorial limits of the several states. The power [838] to make these regulations 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.' It is plenary because vested in Congress 'as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.'"

It may be exercised, said Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 6 L. Ed. 23, "whenever the subject exists." Said Mr. Justice Johnson in the same case:

"The power to regulate commerce carries with it the whole subject, leaving nothing for the state to act upon, and, if there was any one object riding over every other in the adoption of the Constitution, it was to keep commercial intercourse among the states free from all invidious and partial restraints. In all commercial regulations we are one and the same people."

In *Robbins v. Shelby Taxing District*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694, Mr. Justice Bradley declared that the United States are but one country, and are and must be

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subject to one system of regulations in respect to interstate commerce.

In this connection we may well inquire, what is commerce? We are answered in the lucid phraseology of Chief Justice Marshall:

"Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It does not embrace the completely interior traffic of the respective states—that 'which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states'—but it does embrace 'every species of commercial intercourse' between the United States and foreign nations and among the states, and therefore it includes such traffic or trade, buying, selling, and interchange of commodities as directly affects or necessarily involves the interests of the people of the United States. "'Commerce" as the word is used in the Constitution, is a unit,' and 'can not stop at the external boundary line of each state, but may be introduced into the interior.' The genius and character of the whole government seems to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally."

This was the language of the great Chief Justice in the famous case of *Gibbons v. Ogden*. It is further defined in the *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238:

"Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including, in these terms, navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities."

This expression was adopted anew in *Gloucester Ferry Company v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158. It follows that interstate commerce does not, therefore, exist in transportation merely. "It includes the purchase and sale of articles that are intended to be transported from one state to another—every species of commercial intercourse among the states and with foreign nations."

A more recent definition is that of Judge Hough of the Southern District of New York in the very recent case of the *United States of America* against *The McAndrews & Forbes Company et al.*, known as the "Licorice Paste Case." "'Commerce,' in its simplest signification, means the exchange of goods, but with the advancing complexity [839] of civilization it is now certainly significant, not only of ex-

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change, but of the buying and selling of commodities, and especially of the exchange of merchandise on a large scale. It may be said to be trade, traffic, or exchange between different places and communities. Webster's Dictionary, quoted in *State v. Indiana, &c., Co.*, 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502." So that nowadays, and in the sense in which the word is used in the statement of the law which I shall presently read you, its import or meaning comprehends intercourse for the purposes of trade in all its forms. *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 347. And interstate commerce, therefore, comprehends intercourse for the purposes of trade in any and all of its forms, including transportation, purchase, sale, and exchange of commodities between the citizens of different states. *Hopkins v. United States*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290. Therefore, if any commercial transaction reaches an entirety in two or more states, and if the parties dealing with reference to that transaction deal from different states, then the whole transaction is a part of the interstate commerce of the United States. *United States v. Swift* (C. C.) 122 Fed. 529.

Now what is the law which Congress has enacted for the purpose of protecting this commerce thus defined from the injurious operations of illegal and unlawful combinations in restraint of it. We find that Congress passed the act approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the "Sherman Anti-Trust Law," the parts of which, important for our consideration here, are as follows:

"SECTION 1. Every contract or combination in the form of a trust or otherwise, or conspiracy in restraint of trade and commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor and any conviction thereof shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court.

"SEC. 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire to monopolize any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor, and any conviction thereof shall

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be punished by fine not exceeding \$5,000 or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court."

Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200].

The first efficient case in which a full analysis of the law was given by the Supreme Court of the United States was that of *United States v. Freight Association*, 166 U. S. 323, 17 Sup. Ct. 540, 41 L. Ed. 1007. This is properly called the "*Trans-Missouri Case*." It was there held that the prohibitory provisions of the act of July 2, 1890, namely the "Anti-Trust Act," applied to all contracts in restraint of interstate and foreign trade or commerce, without exception or limitation, and are not confined to those in which the restraint is unreasonable. It was also held that, in order to maintain its case, "the government is not obliged to show that the agreement in question was entered into for the purpose of restraining trade or commerce, if such restraint is its necessary effect." A comprehensive view of the law may be found [840] in the latter case, in the language of Mr. Justice Peckham, to which I invoke your special attention:

"It is wholly different, however, when such changes are effected by combinations of capital, whose purpose in combining is to control the production or manufacture of any particular article in the market, and by such control dictate the price at which the articles shall be sold, the effect being to drive out of business all the small dealers in the commodity, and to render the public subject to the decision of the combination as to what price shall be paid for the article. In this light it is not material that the price of an article may be lowered.

"It is in the power of the combination to raise it, and the result in any event is unfortunate for the country by depriving it of the services of a large number of small but independent dealers who were familiar with the business and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein.

"Whether they be able to find other avenues to earn their livelihood is not so material, because it is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company, and bound to obey orders issued by others. Nor is it for the substantial interests of the country that any one commodity should be within the

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sole power and subject to the sole will of one powerful combination of capital. Congress has, so far as its jurisdiction extends, prohibited all contracts or combinations in the form of trusts entered into for the purpose of restraining trade and commerce. The results naturally flowing from a contract or combination in restraint of trade or commerce, when entered into by a manufacturing or trading company such as above stated, while differing somewhat from those which may follow a contract to keep up transportation rates by railroads, are nevertheless of the same nature and kind, and the contracts themselves do not so far differ in their nature that they may not all be treated alike and be condemned in common."

The next important deliverance upon this subject may be found in the case of *United States v. Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259. There railroad companies formed themselves into an association known as the "Joint Traffic Association." They agreed that they should have jurisdiction over all competitive traffic, with certain exceptions; that they were to fix rates, fares, and charges, and from time to time change the same. No party to the agreement was to be permitted to deviate from or change those rates, fares, or charges, and its action in that respect was not to affect rates disapproved, except to the extent of its interest therein over its own road. They expressly agreed that they would not permit a violation of the interstate commerce act. They also agreed that the managers should co-operate with the Interstate Commerce Commission to secure stability and uniformity in rates, fares, charges, etc. The managers were given power to decide and enforce the course which should be pursued with connecting companies, not parties to the agreement, which declined or failed to observe the established rates. Assessments were made, and the agreement was to continue for five years.

Notwithstanding the profuse assurances upon the part of these railroad gentlemen that they would co-operate with the Interstate Commerce Commission, the Supreme Court of the United States declared their combination and agreement void. In this, as in the *Trans-Missouri Case*, the greatest lawyers in the country were retained [841] for the railroads. Mr. J. C. Carter argued for the Joint Traffic Association, the renowned Edward J. Phelps for the New York Central &

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Hudson River Railroad, and the Hon. George F. Edmunds, clarum et venerabile nomen, for the Pennsylvania Railroad Company. It is perhaps safe to say that no greater and more experienced lawyers ever appeared before an American court. The then Solicitor General appeared for the government. The court, after the most elaborate inquiry and careful consideration, reaffirmed its conclusions in the Trans-Missouri Case.

In *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 240, 20 Sup. Ct. 96, 44 L. Ed. 136, this great statute against modern monopolies again came under review. There the ruling of the court below was made by Circuit Judge Taft. The case involved a combination to control the manufacture and sale and transportation of iron pipe. Said Justice Peckham for the court:

"While no particular contract regarding the furnishing of pipe or the price for which it was furnished was in the contemplation of the parties to the combination at the time of its formation, yet it was their intention, as it was the purpose of the combination, to directly and by means of such combination increase the price for which all contracts for the delivery of pipe within the territory above described should be made, and the latter result was to be achieved by abolishing all competition between the parties to the combination. The direct and immediate result of the combination was therefore necessarily a restraint upon interstate commerce in respect to articles manufactured by any of the parties to it to be transported beyond the state in which they were made. The defendants, by reason of the combination and agreement, could only send their goods out of the state in which they were manufactured for sale and delivery in another state upon the terms and pursuant to the provisions of such combination."

The court held that this was a combination in restraint of trade, and, to the extent to which interstate transactions were involved, the judgment of the court below was affirmed. On the constitutional question the court held that Congress may enact such legislation as shall declare void and prohibitive the provisions of any contract between individuals or corporations where the natural and direct effect of such contracts shall be, when carried out, directly, and not as a mere incident to other and innocent purposes, to affect to any extent interstate or foreign commerce. An association was formed in California by the manufacturers and dealers in tiles, man-



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tiles, and grates. The dealers agreed not to purchase material from manufacturers who were not members of the association, and not to sell unset tile to non-members for less than list prices, which were 50 per cent. higher than prices to members, and all manufacturers who were residents of states other than California agreed not to sell to any one other than members. Violations of the agreement rendered the member subject to forfeiture of membership. Each member was required to carry \$3,000 worth of stock. Whether applicants were to be admitted was a matter for the arbitrary decision of the association. A firm of dealers in tiles, mantels, and grates in San Francisco who had not sought or been asked to join the association, and did not carry \$3,000 of its stock, brought an action to recover damages under paragraph 7 of the anti-trust act of July 2, 1890, namely, the act under consideration (26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]). The court held that although the sales [842] of unset tiles were within the state of California, and although such sales constituted a very small portion of the contract involved, the agreement of the manufacturers without the state not to sell to any one but members was part of a scheme which included the enhancement of the price of the unset tile by the dealers within the state, and that the whole matter was so bound together that the transactions within the state were inseparable and became a part of a purpose which, when carried out, was a combination in restraint of interstate trade or commerce. They held furthermore that the association constituted and amounted to an agreement or combination in restraint of trade within the meaning of the act of July 2, 1890, and that the parties aggrieved were entitled to recover threefold damages found by the jury.

In the case of *Swift Co. v. United States*, printed in 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, and decided January 30, 1905, the court gives its attention to combinations in restraint of trade among the dealers in fresh meat throughout the United States. It is aimed at what is called the "beef trust," and declares that a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live stock

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markets of the different states, to bid up prices for a few days in order to induce shipments to the stockyards, to fix selling prices, and to that end to restrict shipments of meat when necessary, to establish a uniform rule of credit to dealers, and to keep a blacklist, to make uniform and improper charges for cartage, to secure less than lawful freight rates to the exclusion of competitors, with intent to monopoly, is an illegal combination within the meaning and prohibition of the act of July 2, 1890, and can be restrained and enjoined in an action by the United States. The court goes further and holds that it does not matter that the combination of this nature embraces a restraint and monopoly of trade within a single state, if it also embraces and is directed against commerce among the states. It, however, declared that the effect upon interstate commerce is direct and not incidental. It further holds that if a principal element of such a scheme were lawful, and the participants are bound by a common intent as part of the unlawful scheme to monopolize interstate commerce, the balance may make the parts unlawful. To illustrate, they hold that when cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, it constitutes interstate commerce, and the purchase of cattle is an incident of such commerce.

In the famous *Northern Securities Co. Case*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, the following facts were developed: A holding corporation was formed called the "Northern Securities Company." It became the custodian of more than nine-tenths of the stock of the Northern Pacific, and more than three-fourths of the stock of the Great Northern. These were competitive lines. The stockholders of the companies who delivered their stock received upon similar conditions shares of stock in the holding corporation. The court held that the constituent companies ceased under this arrangement to be [843] in active competition for trade and commerce along their respective lines, and became

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practically one powerful, consolidated corporation by the name of the holding company, the principal, if not the sole, object of which was to carry out the purpose of the original combination under which competition between the constituent companies would cease. It was held to be an illegal combination in violation of the anti-trust law, and that it was within the power of the Circuit Court to enjoin the holding company from voting such stock and from exercising any control whatever over the acts and control of the railroad companies, and also to enjoin the railroad from paying any dividends to the holding corporation on any of their stock held by it. "If," said that renowned and venerable American jurist, Mr. Justice Harlan, ever insistent to protect the rights of those who cannot help themselves, "the Anti-Trust Law is held not to embrace a case such as that now before us, the plain intention of the legislative branch of the government would be defeated. If Congress has not by the words used in the act described this and like cases, it would, we apprehend, be impossible to find words that would describe them."

Cases of this general character have been and are of immense consequence to the American people. A large number of cases involving these principles are pending elsewhere in the United States. The law has been of force for 17 years. Its constitutionality has been settled in the great case of *United States v. Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259. A large number of cases have been decided in which such combinations and trusts have been restrained because in violation of the law.

A case of this sort is *Swift Co. and Others v. United States*, already referred to. There a combination between individuals and corporations engaged in the business of purchasing live stock, converting it into fresh meat, and selling the products in interstate commerce, whereby competition both in purchasing live stock and the sale of the meat was suppressed, was declared unlawful by the Supreme Court of the United States.

The same result happened in the case of *General Paper Company v. United States* (U. S.) 26 Sup. Ct. 356, 50 L. Ed.

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686; in *United States* against *The Nome Retail Grocers' Association*, in far Alaska; in the case of the *United States* against *The Otis Elevator Company*; in the *United States* against *The Federal Salt Company*. An indictment was also had against the salt company. Under the penal clauses of the law they were found guilty and sentenced to pay a fine of \$1,000. A great many similar cases are now pending in the various states and territories. All these, and many others of equal or greater interest, appear in the latest report of the Attorney General to the Congress of the United States.

An illustration of the vital significance of this law may be found in the case of *Tift et al. v. Southern Railway Co. et al.* (recently decided by this court) 138 Fed. 753. There, as in the *Trans-Missouri Case*, it was in effect held that a combination to control the rates of a number of railroad companies, called the "Southeastern Tariff Association," was a combination in restraint of trade. Pursuant to the deliberations of that body, they had made an advance of 2 [844] cents per 100 pounds on all lumber shipped from this section to Ohio river points and points beyond in car load lots. As this is a Georgia case, it will perhaps be justifiable to quote a brief extract from the opinion of the court:

"They have no right, to graduate their charges in proportion to the prosperity which comes to industries whose products they transport. With equal reason they might demand an increase of rates for the transportation of cotton with every increase in the value of our great staple. Indeed, to concede the principle for the fixation of rates upon which the railroads, through the medium of the Southeastern Freight Association, have acted in this case, would concede their power to levy for no better service augmentation of tolls for every increase of profit in every line of endeavor won by the enterprise, sagacity, and industry of the American people. It is superfluous to add that a government of law and not of men will never tolerate such domination and control of the trade, manufacture, and commerce of the American people. These views relate exclusively to the facts before the court in this case, as proven incontestably by the evidence, and as found by the Interstate Commerce Commission. Here is no attempt to discredit the incalculable services which are hourly rendered the country by the railways. In nothing do we share the animus or purposes of that sinister, selfish, and insincere agitation which would excite, if it could, the masses of the people to hatred and injustice toward corporations. Such a propaganda provokes in the justly balanced mind, and particularly in the mind trained for

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the administration of law and for the protection of property and personal rights, disapprobation, and, indeed, abhorrence.

"With sincere enthusiasm the judge of this court has elsewhere testified to the wonderful material blessings bestowed upon our once prostrate Southland by our great railway systems. In 'economies of operation; in constant, if gradual, reduction of rates; in increased facilities and more expensive accommodations; in more uniform service for longer distances without change of cars; in abolition of short, disjointed lines under different management; in augmentation of shipping facilities; in physical perfection of the properties, and consequent safety to the public; in the steady increase in value of all the securities of these great highways of Southern commerce. \* \* \* And with what result?

"Where formerly asthmatic engines attached to unsafe and noisome trains, through the solitudes of an impoverished country, like a wounded snake dragged their slow length along, now we behold, on massive rails of gleaming steel, on roadbeds of granitic ballast, successive sections of long freight trains sturdily steaming through a prosperous land smiling with luxuriant crops, beautiful with neat and happy homes, the chimneys of great factories giving employment to thousands, almost marking the miles; or the admiration kindles and the pulse leaps as the limited express, laden with its human freight, glances by on its mission of progress and civilization.

"In nothing do we abate that enthusiastic approval of the services of the railways to the people, but not more than any other human agency is railroad management infallible."

Can it be that such eulogium, earnestly spoken, will be made a travesty of the facts by a short-sighted, sinister, and criminal policy, which ignores rotting cross-ties and quivering road-beds, which places the adolescent, the ignorant, the indifferent, and the underpaid at the telegraph key, which reckons not the daily story of colliding or derailed trains, flaming engines, of murdered and mangled passengers, of brave engineers and trainmen, officials of every rank, crushed into bleeding shapes or burned to cinders—a policy whose shibboleth is that of "damned Iago": "Put money in thy purse." "Go, get money."

The patriotic and proper solution of every controversy, involving the vast questions of combination in restraint of trade, of trusts and [845] transportation, is simply the trial of each case on its particular facts, and with an eye single to the merits of the one party or the other. In interstate

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commerce this is exclusively a duty of the national tribunals, and the laws regulating such commerce are within the exclusive power of Congress, and within the control of a fearless and clear-eyed people who, as Emerson said, "whether James or Jonathan sits in the chair and holds the purse" with their common sense, will conserve the safety of our country.

The inquiry to which your attention will be directed, as I am officially informed, will not, like the *Tift Case* (known as the "*Lumber Rate Case*"), involve interstate and foreign commerce in lumber. I am informed by the district attorney that it will relate to the kindred products of turpentine and rosin, commonly known as "naval stores." These products are of immense value to the people of this and adjacent states. Nor does it appear, notwithstanding predictions to the contrary, that the great natural resources found in the pine forests of Georgia, Florida, and other southern states are about to disappear. It cannot be doubted that with judicious forestry laws and careful attention on the part of the people the pine forests will in a large measure regain their pristine vigor and value. The port of Savannah is believed to be the greatest port for the export and handling of naval stores in the world, and its people, like those of every state from North Carolina to Texas, and the consumers everywhere, should be deeply interested in your inquiry.

You will ascertain then, gentlemen, from the evidence, oral or otherwise, whether there are those who, within the jurisdiction of this court, have entered into contracts or combinations, in the form of trusts or otherwise, or conspiracies, in restraint of trade or commerce among the several states or with foreign nations. You will inquire whether there are those who have monopolized or attempted to monopolize, or combined or conspired with any person or persons to monopolize, any part of the trade or commerce among the states or with foreign nations. I charge you that the word "person" or "persons" in this connection imports corporations also. If you are the men the law presumes you to be, and which I am sure you are, you will permit nothing but the law, the evidence, and your consciences to control your action.

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You will have other grave duties to perform, involving other laws enacted to protect and promote the business, welfare, and happiness and security of our people, in so far as that is within the jurisdiction intrusted to you. The assistant attorneys will be your legal advisers, and you can rely on their interpretation and construction of the law. The court will, on occasion, afford you any assistance in its power.

Grave as are the interests of the people intrusted to your care—for the government and the people are powerless in the lack of your duty well performed—to you the matter of gravest moment and most lasting import is the effect of your conduct, in the presence of these mighty issues of public law, upon the strength and elevation of character, conscience, and citizenship. I adjure you in familiar words, "Let all the ends thou aimest at be thy country's, thy God's, and truth's." To each grand jurymen will I confidently say, "To thine own self be [846] true, and it must follow as night the day, thou canst not then be false to any man."

**NOTE.**—The grand jury, to whom this charge was made, presented indictments against a number of parties and corporations, and the principal defendants, on arraignment, having pleaded guilty, the court imposed fines, amounting in the aggregate to \$30,000; and, accepting the assurance of the accused that they would not again violate the laws against combinations in restraint of trade, no other or further penalty was imposed.

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**[290] UNITED STATES v. STANDARD OIL CO. OF  
NEW JERSEY ET AL.\***

(Circuit Court, E. D. Missouri, E. D. March 7, 1907.)

[152 Fed. Rep., 290.]

**MONOPOLIES—ACT TO PROHIBIT CONSPIRACIES IN RESTRAINT OF TRADE—  
FEDERAL COURTS—CONGRESSIONAL POWER TO AUTHORIZE THEIR  
PROCESS TO RUN OUTSIDE THEIR DISTRICT.**—In a case at law or in equity which arises under the Constitution or laws of the United

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\* See also 173 Fed. Rep., 177; *post*, page 715. 221 U. S., 1; Vol. 4, page 79.

**Syllabus.**

States—and a suit by the United States under Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], “to protect trade and commerce against unlawful restraints and monopolies” presents such a case—Congress is authorized by article 3, §§ 1, 2, of the Constitution, to confer upon any national court jurisdiction to summon the proper parties to the suit to a hearing and decree, wherever they reside or are found within the dominion of the nation, although beyond the limits of the district of the court.\*

**COURTS—FEDERAL COURTS—DISTRICT WHERE SUIT TO BE BROUGHT—RESTRICTION TO INHABITANTS OF DISTRICT INAPPLICABLE WHERE JURISDICTION CONFERRED BY SPECIAL ACTS.**—The inhibition of section 1 of the judiciary acts of 1887 and 1888 (Act March 3, 1887, c. 373, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]), that “no suit shall be brought before either of said courts [the Circuit and District Courts] against any person by any original process or proceeding in any other district than that whereof he is an inhabitant,” is ineffective and inapplicable in instances in which exclusive jurisdiction over particular cases or classes of cases has been conferred upon the federal courts by special acts of Congress.

**MONOPOLIES—INJUNCTION—JURISDICTION TO BRING IN NONRESIDENT DEFENDANTS CONFERRED BY ACT JULY 2, 1890.**—Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], “to protect trade and commerce against unlawful restraints and monopolies,” by section 5 (26 Stat. 210 [U. S. Comp. St. 1901, p. 3201]) confers upon any court of the United States, in which a suit has been brought under it by the United States against a conspirator that is a resident of its district, jurisdiction to bring in non-resident co-conspirators by the service of its process upon them without its district.

**SAME—ENDS OF JUSTICE REQUIRE NECESSARY PARTIES TO BE BROUGHT IN.**—The ends of justice require, within the true meaning of Act July 2, 1890, c. 647, § 5, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3201], that every necessary party within reach of the process of the court, every party who has an interest in the controversy and who ought to be made a party to the suit in order that the court may finally adjudicate the whole matter, should be brought in.

**SAME—PRACTICE UNDER SECTION 5.**—The approved practice under Act July 2, 1890, c. 647, § 5, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3201], is to make all the conspirators, both resident and nonresident, parties defendant to the bill, to set forth therein the existence and history of the conspiracy and the connection of each defendant therewith, and immediately upon its filing to present a petition to the court in which the places where the nonresident defendants can be served with process are disclosed, and to pray therein that they be summoned. An order granting such a petition before service of

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## Syllabus.

process upon the resident conspirator and without notice to the nonresident conspirators is neither premature nor irregular.

**SAME—CONSPIRACY IN RESTRAINT OF TRADE—PARTIES.**—Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], prohibits conspiracies in restraint of trade, and section 4 confers on the several federal Circuit Courts jurisdiction to restrain violations of its [291] provisions; section 5 providing that, whenever it shall appear to the court before which any proceeding under section 4 is pending that the ends of justice require that other parties should be brought in, the court may cause them to be summoned, whether they reside in the district in which the court is held or not. A bill alleged that the Standard Oil Company of New Jersey, a holding corporation, and 7 individual defendants, and about 70 other defendants, called "subsidiary corporations," had formed and were executing a conspiracy to restrain and monopolize commerce in petroleum and its products among the states and territories and with foreign nations; that, pursuant thereto, the individual defendants had caused the control of all the subsidiary corporations and the ownership of a majority of the stock of many of them to be vested in the Standard Oil Company of New Jersey, while the subsidiary corporations were the producers, refiners, traders, and operators, by means of which the restraint and monopoly was effected and the profits obtained; that the individual defendants owned a majority of the stock of and controlled the holding corporation, and through it the subsidiary corporations; that two of the subsidiary corporations, one a corporation of Missouri within the district, in combination with the other defendants, controlled and monopolized the railroad lubricating oil business of the United States; that the defendants had divided the territory of the United States into districts so that certain defendants only were permitted to sell therein; and that the Missouri corporation was a party to this conspiracy. *Held*, that the ends of justice required that all of the defendants, regardless of their residence, be made parties to such proceeding, though they were not necessary parties to a decree merely restraining the Missouri corporation from further continuing its wrongful acts.

On motions to vacate order to bring in nonresident defendants and to quash the service upon them of subpoenas.

*John G. Johnson, John G. Milburn, W. I. Lewis, W. J. McKie, H. S. Priest, George G. Greer, and Motter, Mackenzie and Weadock*, for the motions.

*Frank B. Kellogg (the Attorney General, the Assistant Attorney General, Milton D. Purdy, C. B. Morrison, and C. A. Severance*, on the brief), opposed.

*Opinion of the Court.*

Before SANBORN, VAN DEVANTER, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge.

The United States exhibited its bill in this court under the act of July 2, 1890, "to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), in which it alleged the existence of this state of facts: The Standard Oil Company of New Jersey, a corporation, 7 individual defendants, and about 70 other defendants, called "subsidiary corporations," have formed and are engaged in executing a conspiracy to restrain and monopolize commerce in petroleum and its products among the states and territories and with foreign nations. Pursuant to, and in the execution of, the plan of this conspiracy, the individual defendants have caused the control of all the subsidiary corporations and the ownership of a majority of the stock of many of them to be vested in the Standard Oil Company of New Jersey, a holding corporation, while the subsidiary corporations are the producers, refiners, traders, and operators, by means of which the restraint and monopoly are intended to be and are effected, and the profits of the scheme are gathered. The individual defendants own a majority of the stock of [292] and control the holding corporations, and, through it, the subsidiary corporations. Two of these subsidiary corporations, the Waters-Pierce Oil Company, a corporation of the state of Missouri, whose principal place of business is in this district, and the Galena Signal Oil Company, in combination with the other defendants, restrain commerce throughout the United States in the lubricating oil used by railroad companies, whose value aggregates about \$4,300,000 per annum, so that they control more than 90 per cent. thereof, and thus practically monopolize it. The defendants have divided the territory of the United States into districts, so that certain defendants only are permitted to sell the products of petroleum in specified districts, and all other defendants are restrained by the control of the holding company or by understandings or agreements from effecting sales in these districts. Such an under-

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standing and agreement has been made, and is being carried out, between the Waters-Pierce Oil Company and the defendant the Standard Oil Company of Indiana, whereby the territory in the state of Missouri and other southwestern territory is divided between them, and neither corporation is permitted to market the products of petroleum in the district of the other. The defendants have conspired for the purpose of, and are engaged in, restraining and monopolizing commerce in the products of petroleum throughout the United States by these and other similar means, and the complainant prayed in its bill that they might be enjoined from continuing this restraint, and from maintaining this monopoly, and for other equitable relief.

Section 4 of the act of July 2, 1890, confers upon the several Circuit Courts of the United States jurisdiction to restrain violations of its provisions, and section 5 reads in this way:

"Whenever it shall appear to the court before which any proceeding under section four of this act may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof."

The individual defendants, the Standard Oil Company of New Jersey, and nearly all the subsidiary corporations, except the Waters-Pierce Oil Company, were not inhabitants of, and could not be found in, this district. After the filing of the bill, and upon the presentation by the complainant of a petition which disclosed this fact, the court ordered that the nonresident defendants should be brought in, and that subpoenas should be served upon them in the districts in which they resided. Certain of these defendants have appeared specially, and moved the court to vacate this order and to quash the service of the subpoenas upon them, upon the grounds that the court was without jurisdiction to make the order, that it was prematurely and irregularly made, and that the ends of justice did not require that the non-resident defendants should be brought into this suit.

The judicial power of the United States is vested by the Constitution in the Supreme Court, "and in such inferior

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courts as the Congress may from time to time ordain and establish." This power extends "to all cases in law and equity arising under this Constitution and the laws of the United States,—to controversies to which the United States shall be [293] a party," and to other cases not material to the issues here presented. Article 3, §§ 1, 2. This is a case in equity arising under a law of the United States. The United States is a party to the controversy which it involves; and the Congress had ample authority, under these provisions of the Constitution, to confer upon this or upon any inferior court of the nation jurisdiction of this suit and power to summon the proper parties to it, wherever residing or found within the dominion of the nation, to a hearing and decree herein. *U. S. v. Union Pac. R. Co.*, 98 U. S. 569, 604, 25 L. Ed. 143. As the Congress had the authority to enact that in this, and other cases of this class, any Circuit Court in which the United States might bring its suit might, by process served anywhere in the United States, lawfully bring into it all the parties necessary to the adjudication of the controversies it involved, they had authority to empower such a court to bring in these parties whenever in its opinion the ends of justice should require such action, because the whole is greater than any of its parts and includes them all.

The inhibition of section 1 of the judiciary acts of March 3, 1887, c. 373, 24 Stat. 552, and Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], that "no civil suit shall be brought before either of said courts [the Circuit and District Courts] against any person by any original process or proceeding in any other district than that whereof he is an inhabitant," does not restrict the jurisdiction of this court, nor its power to bring in parties without its district, in the case under consideration, because that provision is inapplicable to instances in which exclusive jurisdiction over particular cases, or classes of cases, is created and conferred upon the courts of the United States by special acts of Congress. *U. S. v. Mooney*, 116 U. S. 106, 6 Sup. Ct. 304, 29 L. Ed. 550; *Van Patten v. Chicago, Milwaukee & St. Paul R. Co.* (C. C.) 74 Fed. 981, 985-988; *Atkins v. Disintegrating Co.*, 18 Wall. 272, 21 L. Ed. 841; *In re Louisville Underwriters*, 134 U. S.

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488, 493, 10 Sup. Ct. 587, 33 L. Ed. 991; *In re Hohorst*, 150 U. S. 653, 662, 14 Sup. Ct. 221, 37 L. Ed. 1211. There can therefore be no doubt that Congress had the authority to confer jurisdiction of this case upon this court, nor that they have lawfully exercised that authority; and the only question is whether or not this court exceeded the power thus conferred upon it when it summoned the non-resident defendants.

Counsel call attention to the fact that the complainant alleges in its bill that the seven individual defendants conceived and put into operation the plan whereby the Standard Oil Company of New Jersey, with a capital of \$113,000,000, became the holding company, and whereby, through it, they direct and control the acts of the subsidiary corporations, and they contend that, if a Circuit Court, within whose district one of these eight principal defendants is a resident, would have the power in a suit of this nature to bring in nonresident parties necessary to a complete adjudication of the case, nevertheless, the subsidiary corporations are mere tools of the principal defendants, and the act was not intended to grant, and does not give, to a court within whose district a subsidiary corporation only resides, the power to summon the other conspirators who are not residents of that district. They argue that it is only where there is a resident defendant who is a participant in the whole length and breadth of the conspiracy that non-resident [294] conspirators may be lawfully subpoenaed; that the Waters-Pierce Oil Company, the resident defendant, has a capital of only \$410,000, is but a puppet of the principal conspirators, is alleged to be effecting a mere local and limited restraint of trade, and is not made to appear to be taking any part in the main conspiracy. And they insist that, on account of its limited power and efficacy, this court is without jurisdiction to bring in the principal defendants or any defendants who would not be indispensable parties to a suit to enjoin the specific restraint which the resident defendant is engaged in effecting.

Repeated readings of the act under which this bill is brought disclose no such limitation or condition of the authority granted to the Circuit Courts to bring in non-resident parties. The power is given without restriction to

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every Circuit Court whenever it appears to it that the ends of justice require its exercise. The Congress has unlimited discretion here. It might have conditioned this authority by the rank, by the power, or by the degree of participation in the conspiracy of the resident defendant. The fact that it failed to do so raises a persuasive presumption that it never intended to impose any condition or limitation of this nature.

Again, the alleged conspiracy is one. Its scheme is single. It has but one object. Perhaps none of the alleged conspirators participates in every part of the conception and of the work of the combination, but every one of them takes his part in the plan or in its execution, a part promotive of its purpose, the restraint and monopolization of commerce in the products of petroleum among the states. To the Waters-Pierce Oil Company, the resident defendant, has been allotted no inconsiderable portion of the execution of this plan. Its part is, with the aid of the Galena Signal Oil Company, to restrain and monopolize the commerce throughout the United States in the lubricating oil used by railroad companies, and, with the aid of the Standard Oil Company of Indiana, to divide between them the territory in Missouri and the Southwest, and to restrain and monopolize the commerce in the products of petroleum in their respective districts. It has accepted its assignment and is engaged in the performance of this portion of the scheme of the conspiracy. It has been engaged in executing some part of its plan for many years. It is true that a majority of its stock is owned by the eight principal defendants, that they choose its officers, control its operation, and share its profits; but the Waters-Pierce Oil Company is still a distinct legal entity, a corporation of the state of Missouri. The knowledge of its officers and directors is its knowledge, and those officers and directors cannot have caused this corporation to act its important part in the accomplishment of the purpose of this conspiracy without knowledge of the conspiracy, its scheme, its object, and its effect. One who learns of a conspiracy after it is formed, and then joins it, or knowingly aids in the execution of its scheme, and shares in its profits, becomes from that time as much a co-conspirator as if he were one of those who originally designed it and put it in operation. *Lincoln v. Claffin*,

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7 Wall. 132, 138, 19 L. Ed. 106; *United States v. Babcock*, Fed. Cas. No. 14,487; *United States v. Cassidy* (D. C.) 67 Fed. 698, 702; *The Anarchists' Case*, 12 N. E. 865, 976, 17 N. E. 898, 122 Ill. 1, 3 Am. St. Rep. 320; *United [295] States v. Johnson* (C. C.) 26 Fed. 682, 684. "If a series of acts are to be performed with a view to produce a particular result, he who aids in the performance of any one of these acts, in order to bring about the result, must have the intention to effectuate the end proposed, and if he operates with others, knowing them to have the same design, there is in fact an agreement between him and them. His criminal intent is not to be distinguished from the intent of those who first formed the plans of the conspiracy." *People v. Mather*, 4 Wend. (N. Y.) 230, 260, 21 Am. Dec. 122. The Waters-Pierce Oil Company, the resident defendant, was therefore a conscious and active party to the entire conspiracy, and the act of July 2, 1890, conferred ample power upon this court to bring in its non-resident co-conspirators whenever it was made to appear to it that the ends of justice required their presence.

Was the order irregular or premature? Immediately after the filing of the bill, and before a subpoena had been issued or served upon the resident defendant, the United States presented its petition that the non-resident defendants should be brought in, and it was granted. It is insisted that the order was premature, and that the court was without power to make it, until after the resident defendant had been served with process, and notice of the hearing upon the petition had been given to the defendants without the district. But the statute requires no notice of the application for the order, and there is no reason for it, because the order conclusively adjudicates nothing, and every question which conditions its validity or propriety is open to challenge, hearing, and decision as completely after, as before it was made, as in the case now under consideration. The act does not prescribe the time or the manner in which it shall be made to appear to the court that other parties should be brought before it, and, in the absence of any provision of this nature, the requisite appearance may be made at such a time and in such a way as the court, in the exercise of a sound judicial dis-

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cretion, may direct or permit. The method suggested by counsel for the defendants is that the United States should first file its bill against the resident conspirators, and cause service of process to be made upon them, and that thereafter it should present a petition that the non-resident conspirators should be brought in and made parties to the suit. The method pursued was to make all the alleged conspirators defendants to the bill, to set forth therein the existence and history of the conspiracy and the connection of each defendant therewith, and immediately upon its filing to present a petition, in which the places where the non-resident defendants could be served with process were disclosed, and to pray therein that they be summoned. In the prosecution of each method, the question whether the non-resident conspirators are necessary or proper parties to the suit between the government and the resident conspirators equally conditions the duty of the court to bring them before it. In the prosecution of each method, that question may be well determined. No sound reason occurs to us why the former is preferable to the latter. On the other hand, the presentation of its entire cause of action in the original bill, in which all the alleged conspirators are named as defendants, and wherein their connection with the conspiracy is set forth, accom[296]panied by a petition which discloses the places where non-resident defendants may be served, is the more concise, logical, and satisfactory manner of presenting the issue whether or not the conspirators without the district should be brought into the suit, and the presentation of this question in this way and the order in this case were neither irregular nor premature.

Finally, it is insisted that it did not appear to the court that the ends of justice required the non-resident defendants to be brought before it, because more of them and more of the original and chief conspirators resided in the Southern district of New York and in certain other districts than in the district in which this court sits, and it is contended that the ends of justice will be more completely served by the prosecution and adjudication of the controversy involved in this suit in the district of the inhabitancy of a larger number



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of the defendants. But that question is not open to the consideration or adjudication of this court. The Congress did not confer jurisdiction, in this class of cases, upon the Circuit Court in whose district the largest number of conspirators resided, but upon every Circuit Court in whose district a resident conspirator could be found and served with process. It did not grant to any of the Circuit Courts the power to select the court in which the United States should institute its suit. If it had done so, each court might have selected another. It left the complainant free to commence its suit in any Circuit Court in which it could find and serve a resident conspirator. It instituted its suit in this court and invoked its exercise of its power to acquire jurisdiction of the defendants by the issue and service of its process. The question presented by the petition for that purpose was, not in which court the ends of justice required the complainant to choose to institute its suit, but whether or not in this suit the ends of justice required that the non-resident defendants should be brought in.

The exercise of the power conferred upon the courts by the Constitution and the acts of Congress, to acquire jurisdiction of controversies and parties by the issue and service of their process, is not discretionary with the courts, when a complainant demands it. It is an imperative duty, which may not be renounced, and whose discharge may not be evaded. It is the duty of a court of equity to finally determine the entire controversy before it, and to do complete justice by adjusting all the rights involved therein. Hence, in every suit in which the power to acquire jurisdiction of the subject-matter and of the parties is conferred upon the court, the duty is imposed upon it, if its discharge is invoked by the complainant, to summon and hear, before decision, not only every indispensable party, but every necessary party within reach of its process, every party who has an interest in the controversy, and who ought to be made a party to the suit in order that the court may finally adjudicate the whole matter, although if he were not amendable to process, final justice might be administered between the other parties without his presence. *Story's Eq. Pl.; Shields v. Barrow*, 17

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How. 130, 15 L. Ed. 158; *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 235, 22 Sup. Ct. 308, 46 L. Ed. 499.

The scope of the bill in this case is broad and comprehensive. It portrays an alleged conspiracy which extends throughout the nation. [297] Nothing less than a permanent injunction against the continuance of the operation of this conspiracy and the maintenance of the restraint and monopoly its effects will give adequate relief for the violation of the act of Congress averred in the bill. An injunction against the continuance of the acts of the Waters-Pierce Oil Company and of a few subsidiary corporations would be futile, because the remaining conspirators could assign the parts in the scheme of the conspirators enjoined to others, and continue the restraint. Even in the granting of the latter relief, however, the non-resident defendants are materially interested, because they are co-conspirators with the Waters-Pierce Company, and share in the benefits and profits derived from its operations. The ends of justice therefore required that the non-resident defendants should be brought into this suit, because the complainant was entitled to complete relief from the alleged violation of the statute disclosed by the bill, and the non-resident defendants were materially interested in the controversy involved and in the relief sought.

Our conclusions are these: Congress had the power, under the Constitution, to confer jurisdiction of suits of this nature upon this court, and to authorize it to bring into a suit against a resident conspirator non-resident co-conspirators by service of its process upon them anywhere within the dominion of the United States. It exercised this power by the act of July 2, 1890. The Waters-Pierce Oil Company was a resident of this district and a co-conspirator with the non-resident defendants. The fifth section of the act granted authority to bring in the non-resident co-conspirators by service of its subpoenas upon them without this district. The ends of justice required the court to bring them in. The proceedings for that purpose were regular, and the order was timely, and the motions to vacate it and to quash the service of the subpoenas issued under it must be denied.

Let an order be entered accordingly.

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## [321] McCONNELL v. CAMORS-McCONNELL CO.\*

(Circuit Court of Appeals, Fifth Circuit. March 5, 1907. On Rehearing April 15, 1907.)

[152 Fed. Rep. 321.]

**EVIDENCE—PAROL EVIDENCE—CONTRACTS.**—Where a contract for the sale of a business sought to be enforced was only partially in writing, defendant was entitled to prove the balance by parol in order to establish that it was void as in restraint of trade.<sup>b</sup>

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1882, 2027.]

**CONTRACTS—VALIDITY—RESTRAINT OF TRADE.**—Where a contract for the sale of a business in which defendant was formerly a partner provided for the organization of complainant corporation in order that another corporation, which was practically a trust, organized to monopolize the business in which complainant was engaged, and declared that for a specified period defendant should not enter into a competing business, after which, and as a part of the arrangement, the trust corporation acquired a monopoly of the business in the United States and stifled competition, the contract was in violation of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], to prevent unlawful restraints and monopolies, and was therefore unenforceable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 547-555; vol. 27, Injunction, § 120-123.]

**SAME—PARTIES.**—Where a contract for the organization of plaintiff corporation was made for the purpose of enabling a trust organized to monopolize the business to control it, and the trust interest in the corporation was represented by P. in person, who was president of the trust, it was no answer, to an objection that the contract was void as in restraint of trade, that the trust corporation was not a formal party to the proceeding.

Appeal from the Circuit Court of the United States for the Southern District of Alabama.

See 140 Fed. 412.

We find this case stated accurately in the printed brief filed by the solicitors for the appellant, from which it appears that:

This cause was commenced by a bill in chancery originally filed November 30, 1904, by Andrew W. Preston and Camors-McConnell Company against Herbert L. McConnell, seeking to enjoin the defendant from violating the fifth paragraph of what purports to be a

\* For opinion of Circuit Court, see 140 Fed. Rep. 412, vol. 2, p. 817.

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contract made on the 8th day of December, 1899, between Andrew W. Preston, of the first part, J. B. Camors and Herbert L. McConnell, composing the firm of Camors, McConnell & Co., of the second part, and several other parties who were interested in the business of Camors, McConnell & Co., of the third and fourth parts. The alleged contract recites that Camors, McConnell & Co. were engaged in the business of growing, importing, and selling tropical fruits, and desired to transfer their business, good will, etc., to a corporation to be organized; that the other parties to the contract had some interest in the business of Camors, McConnell & Co., and Preston desired to obtain an interest in the new corporation; that in consideration of the premises, and the mutual agreements of the parties, and \$1 paid, it was agreed:

(1) That Preston should cause a corporation to be formed under the laws of New Jersey, to be called the "Camors-McConnell Company," with a capital stock of \$60,125, divided into shares of \$100 each, with power to carry on the business of Camors-McConnell Company, and to be governed by a board of five directors.

[§22] (2) That Camors, McConnell & Co. should transfer to the new corporation all of their property, good will, etc., and receive therefor 321 shares of the capital stock of the new corporation. The property to be purchased was set out in the first schedule attached. The new corporation was to assume the debts and liabilities of Camors, McConnell & Co. specified in the second schedule attached.

(3) That Preston should buy and Camors, McConnell & Co. sell to him, or his assigns, 161 shares of the stock of the new corporation for \$30,000 in cash; that in order that Preston should retain, as long as he desired, the power to elect three of the five directors of the new corporation, and the other stockholders should elect two, Preston should transfer and assign one share of his stock to a trustee, to be named by him, to be held in trust and to be voted in all elections of directors for such three directors as Preston or his assigns should nominate, and for such two directors as the owners of 160 shares of the capital stock should nominate, but that such one share should not be voted for any other purpose, and should not participate in the dividends of the company.

(4) That Preston should subscribe for 80 shares of the stock of the new corporation, and pay \$10,000 therefor, and that the other parties should subscribe for 80 shares of such stock, and pay \$10,000 therefor.

(5) "That said J. B. Camors and Herbert L. McConnell, Louis Weinberger, Jacob Weinberger, Rudolf Braden, J. W. Kroesmann, Ernst Braden and John C. Dehls, hereby jointly and severally covenant and agree that they will not, either individually or by or through a corporation, jointly or severally, directly or indirectly, engage in the growing or importing or selling of tropical fruits or any other business directly or indirectly in competition with the new corporation, or with the United Fruit Company, except through the new corpora-

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tion, until after the said Camors-McConnell Company, the new corporation shall have ceased the active continuance and prosecution of the business of importing and selling such fruit, or shall have failed to have shown a profit for any calendar year after 1890. All profits earned by the new corporation shall be divided every three months by dividends declared. This provision shall not exclude any of the parties hereto from being concerned in the business or businesses of the Bluefields Steamship Company, Ltd., of the Camors-Weinberger Banana Company, Ltd., or the Orr-Laubenheimer Company, and provided further this provision shall not exclude Kroesmann, Braden & Co., J. W. Kroesmann, Ernst Braden, John C. Dehls or Rudolf Braden from engaging in a general mercantile business or from exporting cocoanuts or other produce, excepting tropical fruits."

(6) That the parties, other than Preston, should cause to be executed all conveyances and assignments necessary, in the opinion of H. Pillans, Esq., to carry out these agreements.

(7) That the parties other than Preston, should make all such other covenants and conveyances as should be necessary and convenient to carry out the contract according to its true intent.

(8) That Preston should use his influence to retain McConnell as manager of the new corporation as long as he would act, provided, in Preston's opinion and that of a majority of the remaining stockholders, McConnell was a fit person therefor, and if he was deemed an unfit person, or was unwilling to longer serve, then that Preston should use his influence that the manager should be a person agreeable to the stockholders other than himself and assigns, provided he was, in Preston's opinion, a competent and fit person.

(9) That the new corporation should purchase from certain other persons certain property—set out in the third schedule.

(10) That the new corporation should buy certain other property therein named.

(11) That the new corporation should enter into certain agreements with Kroesmann, Braden & Co. for a period of 10 years, which should contain certain provisions similar to the provisions of another contract there referred to.

(12) That the directors of the new corporation should receive no compensation.

[§28] Attached to this contract was an extract from the additional contract provided by the eleventh paragraph of the contract, and also schedules there referred to.

The bill of complaint alleges that the Camors-McConnell Company (the new corporation) was engaged in the business of growing and purchasing tropical fruits in Central America and importing the same into the United States, through the Port of Mobile, and selling them throughout the United States, and in chartering and operating steamships between Panama and Mobile for that purpose. That, prior to the organization of the Camors-McConnell Company, the business

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conducted by it belonged to and was carried on by the copartnership known as Camors, McConnell & Co., composed of J. B. Camors and H. L. McConnell. That said copartnership had, prior to 1899, built up and was conducting a large and profitable business in the importation of tropical fruits from Colombia, through the Port of Mobile, and was widely known to the dealers in the United States and the planters in Central America, and had acquired an extensive good will. That their tangible assets did not exceed \$30,000, but that their assets and good will was fully worth \$50,000. That Preston, representing himself and associates, desired to purchase an interest in such partnership, and for that purpose entered into the written contract first hereinabove referred to. That this agreement was duly carried out, ratified, and approved by Camors, McConnel & Co.

That, pursuant to such agreement, the new corporation was, in the year 1899, organized under the name of "Camors-McConnell Company," in order to identify it in the public mind with said copartnership, whose business, property, and good will it was its purpose to exploit. That immediately after all the property, good will, and effects of said copartnership in said agreement described were transferred to it by said copartnership of Camors, McConnell & Co., upon the terms specified and in the manner prescribed in said contract, and with the benefit of the provisions therein contained and hereinabove recited. That in payment therefor Camors-McConnell Company issue to the copartnership the number of shares of the capital stock agreed upon, and assumed and has since paid all the debts and obligations of said copartnership, as specified in the contract. That all of the obligations by said contract imposed upon complainants have been duly and completely performed, as by said contract required, and that said contract, as far as it relates to the provisions contained in the fifth article thereof, has always been held for the use, benefit, and protection of the Camors-McConnell Company. That the defendant was elected the president and general manager and a member of the board of directors of the Camors-McConnell Company, and occupied such position at a salary of \$3,600 a year, until the 21st day of January, 1904, and still remains a member of the board of directors.

Defendant's position as president, general manager, and director gave him full opportunity to intimately acquaint himself with the business and affairs of the corporation, and of knowing all of the methods and secrets of its business and sources of profits, the names of its customers, the nature, scope, and duration of all of its contracts, and enabled him to enlarge his experience, knowledge, and skill in the conduct of the tropical fruit business, and that he took full advantage of these opportunities. That although the company has earned a profit every year since its organization, defendant, in violation of his contract, began some time in 1902 to secretly prepare to engage in business on his own account, or through a corporation to be controlled by him, in direct competition with the business of the

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Camors-McConnell Company. Without the knowledge of the other officers and directors, he acquired an alleged concession of the Republic of Colombia, which he claimed authorized him to improve rivers and harbors, and to acquire lands adjacent to the territory from which Camors-McConnell Company received its supplies of tropical fruits. That, at the expense of Camors-McConnell Company, he transported a party of surveyors and engineers to that country to lay out said lands and plan improvements of rivers and harbors to fit his property for the cultivation of bananas. That, at the expense of said company, he transported to Central America on ships of the company persons whom he was trying to induce to join him in such enterprise on inspection tours of said property. That, while [§24] an officer of the Camors-McConnell Company, he took advantage of his access to the books and records of the company, and extracted therefrom the minutest details, facts, and figures, showing the results of its business, and printed and circulated the same among the public, to induce the public to join him in the organization of a corporation to engage in business in direct competition with the Camors-McConnell Company. That he surreptitiously made use of the funds, property, ships, and employes of the company in furtherance of said scheme, and also sold the better part of the loading plant at Bocas del Toro, consisting of steam launches, lighters and boats, to persons whom he intended to have associated with him in the enterprise, or to have represent him in Panama as agents.

These facts coming to the knowledge of the company, it demanded of the defendant that he desist from the violation of the contract, but that he refused to do so, unless Camors-McConnell Company would take over the concession and lands upon unfair and oppressive conditions. That defendant organized a corporation styled the "American Banana Company," with a capital of \$750,000, for the purpose of taking over and exploiting such concession and engaging in the business of importing bananas and other tropical fruits, and of operating steamships between Mobile and Panama, in competition with the business of Camors-McConnell Company. That he was elected president of the company, and will control and manage the business, in violation of said contract.

That the good will of Camors-McConnell Company was largely built up by the defendant, and its maintenance and enjoyment by Camors-McConnell Company depended on his not engaging in business in competition with it, and that the principal consideration of the purchase, at a large price, of the business and good will of said copartnership, was the covenant made by the defendant and others that they would not engage in a competitive business, and that such covenant was essential to secure to the Camors-McConnell Company the good will of their purchase, and that the business of Camors-McConnell Company extended throughout the greater portion of the United States, and said covenants were coextensive only with the interest trans-

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ferred, and did not exceed in territory the extent of the business of said copartnership of Camors, McConnell & Co. That if defendant were permitted to be and remain an officer in the American Banana Company, or to direct the operations of it, the value of its good will and business purchased by the Camors-McConnell Company would be destroyed and great loss and damage inflicted upon complainants. That the complainants never consented to the defendant's engaging in such business, but protested against his doing so, and warned him that they would seek the enforcement of their rights under said contract. That, in so far as the provisions of the fifth article of the contract was concerned, they were made and have always been and still are held and exist for the use and protection of the Camors-McConnell Company, and that complainants both had a direct pecuniary interest in the enforcement of the contract.

On March 27, 1905, Andrew W. Preston obtained leave to dismiss the bill as far as concerned himself, without prejudice to himself. There were demurrers to the bill, but the action thereon need not be noted. The defendant answered. The answer admits many of the allegations of the bill, and denies others. The admissions are not material to a view of the case as it is considered by the court on this appeal, nor is it necessary to specify extendedly the denial. The answer does deny that Camors, McConnell & Co. had any good will of considerable magnitude, and explained the reasons therefor. He denied that said firm was, prior to the making of said agreement, doing a large and prosperous business, and showed that, on the contrary, owing to the active competition instituted by the United Fruit Company for the purpose of destroying their business, Camors, McConnell & Co. were not prosperous, but had sustained a continuous loss in their business, and that in October, 1899, said firm made an agreement with the United Fruit Company, the substance of which is set out in Exhibit A to the original bill, and in Exhibits I and II attached to the answer. The answer denies that Andrew W. Preston represented himself, and shows that he really represented the United Fruit Company, in making the contract sued upon. It admits that the United Fruit [325] Company, through Preston, desired to acquire a controlling interest in the business of Camors-McConnell Company, but denies that Preston individually desired to obtain any interest therein. It admits that the purpose of forming the new corporation was to combine the interest of several parties, but denies its purpose was to provide for the safe and proper management of the business, and shows that the real purpose of the corporation was to suppress the existing competition in the business of growing, importing, and selling tropical fruits, and to enable the United Fruit Company and others to monopolize and control said business of purchasing and importing tropical fruit and selling it in the several states of the United States, and to fix the quantity of such importation and the prices at which fruit should be sold. That the new corporation was formed so that the



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United Fruit Company, as a holder of a majority of the stock of said corporation, might control and dominate said business in harmony with said purpose. The answer denies that the contract was carried out as made, and shows that, when the Camors-McConnell Company was incorporated, it, on the 27th day of January, 1900, entered into an agreement directly between said corporation and the firm of Camors, McConnell & Co. for the purchase and transfer to said corporation of the property and business of said copartnership, and that the corporation purchased said property and business under said last-named contract, without reference to the provisions of the contract of December 8, 1899, and that the provisions of paragraph 5 of Exhibit A to the bill were wholly omitted from such agreement.

The answer further alleges as follows:

"Further answering the fourth paragraph of the bill of complaint, defendant shows to the court that the formation of said corporation and the sale of the business and property of Camors, McConnell & Co. arose and was brought about in this way: Prior to the year 1899, the entire business in the importation and sale of tropical fruit in the United States was conducted by a comparatively small number of firms and companies. The tropical fruit was obtained by the importers from the West Indies, Central and South America, by them imported into the United States, and sold in many of the states of the United States. There were probably less than 15 individuals, firms, and corporations engaged in importing into the United States fruits from the West Indies, and most of this fruit was sold in the Eastern states of the United States. There were less than a dozen individuals, firms, and corporations engaged in importing fruit from Central and South America. The fruit which was being imported from Central America and South America was principally sold in the Southern, Western and Middle states, and those handling said business had comparatively small capitals. The names of said several companies, to the best of defendant's information, knowledge, and belief, and upon such information, knowledge, and belief, he states to have been as follows, viz. [Here both of these classes are named.]

"The method of conducting this business was to obtain cargoes from places where fruit was raised, partly from plantations belonging to those engaged in importing, but largely by purchasing the fruit from persons resident at the point where the fruit was grown, import the same into the United States, and sell and ship it to various states in the United States. Much of the fruit was sold free on board of cars at the place of deportation, but some was shipped to other states and sold while in transit, and sometimes after it reached its destination. There was great competition between the several parties engaged in the purchase of said fruit, and they were obliged, on account of such competition, to pay fair and reasonable prices for the same. There was no limitation upon the quantity of fruit that each importer should handle, and the quantity of fruit placed upon the market and

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ferred, and did not exceed in territory the extent of the business of said copartnership of Camors, McConnell & Co. That if defendant were permitted to be and remain an officer in the American Banana Company, or to direct the operations of it, the value of its good will and business purchased by the Camors-McConnell Company would be destroyed and great loss and damage inflicted upon complainants. That the complainants never consented to the defendant's engaging in such business, but protested against his doing so, and warned him that they would seek the enforcement of their rights under said contract. That, in so far as the provisions of the fifth article of the contract was concerned, they were made and have always been and still are held and exist for the use and protection of the Camors-McConnell Company, and that complainants both had a direct pecuniary interest in the enforcement of the contract.

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'Fruit Dispatch Company,' all, or substantially all, of the stock of which was owned by the United Fruit Company, and which was wholly dominated and controlled by it. After negotiating and agreeing with the representatives of the United Fruit Company as to a method by which such combination should be formed to restrict the quantity of fruit imported, and regulate prices in the purchase and sale of fruit, it was agreed that a corporation should be formed to take over the business and property of Camors, McConnell & Co., with a capital stock of \$60,125.00, divided into 481 shares, of the par value of \$125 each. That said corporation was to take over the business and property of Camors, McConnell & Co., and was to turn over to said company 321 shares of the capital stock of said corporation in payment therefor, of which said 321 shares the United Fruit Company should purchase 161 shares for the sum of \$30,000, and that the United Fruit Company should then subscribe for 80 shares of the unissued capital stock of the new corporation, and Camors, McConnell & Co. should subscribe for 80 additional shares of said stock, and that each should pay \$10,000 therefor. That the new corporation should import from Bocas del Toro, Colombia, into the United States, such amounts of bananas, cocoanuts, and other tropical fruits as could be carried in two steamers, each of the carrying capacity of about 20,000 or 22,000 bunches of bananas, or, at their option, in three steamers of no greater aggregate carrying capacity, and that the United Fruit Company would not, without the consent of a majority interest of stockholders of the Camors-McConnell Company, who were originally interested in the firm of Camors, McConnell & Co., send any bunches of bananas through northern ports containing less than seven hands into any markets reached by the fruit of the Camors-McConnell Company, and that further restrictions on the importation of fruits might be made upon a pro rata basis to be mutually agreed upon by the United Fruit Company, the Bluefields Steamship Company, Limited, the Camors-Weinberger Banana Company, Limited, Orr-Laubenheimer Company, [§27] and Camors-McConnell Company; and that, when such restrictions were agreed upon, they should be binding, and should be respected. That rules of classification and prices of fruits at the ports of shipment should be mutually agreed upon by the resident managers of the United Fruit Company and the Camors-McConnell Company, and that such classification should govern, as far as possible, any sale of the same fruit. That uniform rates of freight should be agreed upon by the United Fruit Company and the Camors-McConnell Company to apply to all steamers of the said two companies plying between the same or competitive points, excepting then existing contracts, which should be filed by the parties by the delivery of sworn copies of the original in each case to the other company, and said contract was to remain in force for a period of 10 years.

"It was further agreed that the Camors-McConnell Company should appoint the Fruit Dispatch Company its sole and exclusive agent, to

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sell all fruit imported by the Camors-McConnell Company from Bocas del Toro in Colombia, or elsewhere, to New Orleans, in Louisiana, or Mobile, Alabama, or elsewhere; the prices to be fixed weekly by four persons selected by the United Fruit Company, the Bluefields Steamship Company, Limited; the Orr-Laubenthaler Company, the Camors Weinberger Company, Limited, and the Camors-McConnell Company. That the fruit of the Camors-McConnell Company should be sold to the best advantage free on board of cars at New Orleans or Mobile, or other ports of entry, under the direction of two competent persons, selected one by the United Fruit Company and one by the manager of the Camors-McConnell Company, and that all the fruit not so sold should be shipped or consigned by the Dispatch Company for sale for account of said Camors-McConnell Company, to such points as such persons should designate. That that contract was to remain in force for 10 years.

"The said United Fruit Company undertook to have said contract reduced to writing. Exhibit A to the bill of complaint was one of the forms of contract so prepared and presented to those interested in the firm of Camors, McConnell & Co. As so prepared and presented, the name of Andrew W. Preston appeared instead of the United Fruit Company therein, but all of the parties to said transaction always recognized the United Fruit Company as the true party in interest; and although stock in the Camors-McConnell Company was, after that company was formed, issued to said Preston, dividends thereon were paid to the United Fruit Company as the owner of said stock. There were a considerable number of dividends so paid, and, although the said Preston was the president of the United Fruit Company, he never questioned its right to use these dividends, or objected to the payment thereof to it. The United Fruit Company had the remaining terms of said contract reduced to writing in the form of two separate contracts, which were presented and executed by the parties whose names appear thereto, and which two contracts are marked Exhibits I and II to this answer and made part hereof.

"Further answering the bill of complaint, this defendant says that the said Camors-McConnell Company and the United Fruit Company are conducting their business in a manner violative of the laws of the United States; that at the time said contract, made Exhibit A to the bill of complaint, was made and entered into, the purpose of making said contract was to aid and facilitate the said United Fruit Company and the said Camors-McConnell Company and the other companies in combination with them in conducting their business in violation of the laws of the United States; that said contract was made in restraint of trade and commerce among the several states and with foreign nations, and for the purpose of forming and maintaining a combination in the form of a trust, to regulate and to limit the supply of tropical fruit imported into the United States and control the prices at which such fruit should be purchased from growers and at which it should be sold to dealers throughout the United

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States, and generally to monopolize and control said business; and that for said reason said contract is against public policy, and in violation of law, and is null and void.

"Further answering the bill of complaint, this defendant says that after the several agreements, one of which is made Exhibit A to the bill of complaint, and the other three of which are made Exhibits I and II and III to this [§28] answer, were made and entered into, and after the United Fruit Company had bought out the property and business of a large number of competitors in the importation and sale of tropical fruits in the Central, Southern, and Western states, and bound most of the parties making such sales not to compete with them in the business, by agreements similar to the one made Exhibit A to the bill of complaint, and had made agreements similar to those attached to this answer as Exhibits I and II, with several other corporations and parties engaged in said business, and it and said corporations and parties, with whom it had such agreements, under such agreements fixed and regulated the price at which tropical fruits were purchased at the point of shipment, and sold and disposed of all of the fruits so imported by it and them through the Fruit Dispatch Company in such manner as to, to a large extent, fix and control the price at which tropical fruit was sold throughout the United States; that, out of the commissions paid to the Fruit Dispatch Company, the expenses of that company were paid, and the balance of its earnings were distributed pro rata among the several companies whose fruit it handled. By virtue of said several agreements and combinations, the United Fruit Company and its associations not only fixed and regulated the prices at which tropical fruits were purchased and sold, but monopolized almost the entire business in the Southern, Central, and Western states of the United States, and regulated the prices of tropical fruits therein, and, when necessary to do so in order to control and fix such prices, the said Fruit Dispatch Company, under the control and direction of the said United Fruit Company, caused a great deal of fruit to be destroyed."

Exhibits I and II are as follows:

## EXHIBIT I.

"An agreement by and between the United Fruit Company, incorporated under the laws of New Jersey, of the one part, and J. B. Camors, Herbert L. McConnell, Rudolf Braden and Louis Weinberger (herein called stockholders) of the other part.

"Whereas, the stockholders are the holders of all the capital stock of the Camors-McConnell Company (herein called the Camors Company), which is engaged in the business of growing, transporting and selling tropical fruit, and the United Fruit Company is also largely engaged in similar business: Now, therefore, in consideration of the premises and of the mutual agreement hereof, it is hereby agreed as follows:

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"(1) The United Fruit Company agrees that the Camors Company may import from Bocas del Toro, Colombia, into the United States, such amounts of bananas, cocoanuts and other tropical fruit as can be carried in two steamers, each of the carrying capacity of about twenty or twenty-two thousand bunches of bananas, or at the option of the Camors Company, in three steamers of no greater aggregate carrying capacity than that of the said two steamers above provided for, and that of the said two steamers above provided for, and which the Camors Company shall be entitled to substitute for such two larger steamers, and the said United Fruit Company agrees that after it has completed its own cargoes to an aggregate amount of not exceeding one hundred and twenty thousand stems per month of four weeks for its own ships operated by it to Bocas del Toro, it will furnish bananas of good average quality and quantity sufficient to complete the cargoes of and fill the steamers of the said Camors Company above described, at prices to be agreed upon between the resident managers of the United Fruit Company and the said Camors Company, but the same not to exceed twenty-five cents in the United States currency per bunch of firsts delivered alongside the steamer. It is further agreed that the said resident manager of the Camors Company shall be such person as the stockholders above named or the owners of a majority of their stock in said Camors Company shall designate so long as he performs his duties and obeys the mandates of the board of directors.

"(2) The United Fruit Company agrees that it will not, without the consent of a majority of interest of the above named stockholders, send any bunches of bananas through the northern ports containing less than seven hands into [829] any of the markets reached by the fruit of the Camors Company. Further restrictions on imports of southern ports may be made upon a proportionate basis mutually agreed upon by the following importers, namely, the United Fruit Company, the Bluefields Steamship Company, Limited, Camors-Weinberger Company, Limited, Orr-Laubenhelmer Company Limited, and the Camors-McConnell Company, and when so made shall be binding and respected. And the amounts of imports above prescribed may be increased proportionately for the said United Fruit Company and the Camors-McConnell Company, upon consent of the United Fruit Company and the majority of the above named stockholders, who hold the shares of stock which are retained by the Camors-McConnell Company pursuant to the contract.

"(3) Rules for the classification and prices of the fruit at port of shipment shall be mutually agreed upon by resident managers of the United Fruit Company and the Camors Company and the same classification shall govern so far as possible in the sale of the same fruit.

"(4) Uniform rates for freight and the carriage of passengers shall be agreed upon by the United Fruit Company and the Camors Company to apply to all steamers of the said two companies plying be-

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tween the same or competitive points, excepting from the operation hereof such present existing contracts as shall be filed by the contracting parties by delivering a sworn copy of the original in each case to the other of the last said companies respectively.

"(5) This contract shall remain in force for ten years from this date, unless sooner modified by the consent of parties.

"In witness whereof the United Fruit Company has caused these presents to be executed in its name and behalf by its duly authorized officers and the said stockholders have hereto set their hands and seals, this 8th day of December, 1899.

"UNITED FRUIT COMPANY.

"MINOR C. KEITH, *1st Vice President*,

"By B. W. PALMER, *Secretary*.

"H. L. McCONNELL.

"LOUIS WEINBERGER.

"RUDOLF BRADEN."

## EXHIBIT II.

"An agreement made by and between the Fruit Dispatch Company, incorporated under the laws of New Jersey, of the one part, and the Camors-McConnell Company incorporated under the laws of New Jersey (hereinafter called the Camors Company), of the other part.

"Whereas, the Camors Company is engaged in growing, importing into the United States and selling tropical fruit, and the Fruit Dispatch Company is formed for the purpose of and is engaged in handling and selling such fruit: Now, therefore, in consideration of the premises and of the mutual agreements herein contained, it is hereby agreed and declared as follows:

"(1) The Camors Company hereby appoints the Fruit Dispatch Company its sole and exclusive agent to sell all fruit imported by the Camors Company imported from Bocas del Toro or elsewhere, to New Orleans, in Louisiana, or Mobile, in Alabama, or elsewhere.

"(2) All fruit of the Camors Company shall be sold to best advantage free on board cars at New Orleans or Mobile or other port of entry under the direction of two competent persons, one selected by the manager of the Camors Company (whose services shall be paid for by the Fruit Dispatch Company at such amount as the Camors Company and the Fruit Dispatch Company shall agree), and all fruit so unsold by them shall be shipped or consigned by said Dispatch Company for sale for account of said Camors Company to such points as said two persons shall designate, to be handled as they may direct.

"(3) Payments for the fruit sold by or through the Fruit Dispatch Company shall be made during each calendar week for all sales completed during the preceding calendar week. The Fruit Dispatch Company shall charge five per cent. on the selling price for all fruit sold by it.

[220] "(4) This contract shall remain in force until December 8, 1909, unless sooner modified by the consent of the parties.

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"In witness whereof the parties have caused these presents to be signed by their respective officers thereto duly authorized, this 27th day of January, 1900.

"Fruit Dispatch Company,

"By A. W. Preston, President.

"Camors-McConnell,

"By A. W. Palmer, President.

"Attest: Frank Hendrick, Secty."

The complainant excepted to the several portions of the answer hereinabove set out between quotation marks, as irrelevant, immaterial, and impertinent to the issue. The court referred the matter to a master, and he sustained the exceptions. The defendant excepted to the master's report, but these exceptions were overruled, and the action of the court in overruling the exceptions is assigned as error. Evidence was taken, and the case came on for final hearing, which resulted in the decree appealed from, perpetually enjoining the defendant from engaging in business in competition with the business of complainant for and until it has failed to show a profit for any calendar year after the year 1899.

*Gregory L. Smith and H. T. Smith, for appellant.*

*Walker B. Spencer and Chas. P. Cocke, for appellee.*

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The question in this case which we deem it necessary to consider is: Was the contract between the parties void because made for the purpose of forming an illegal trust or combination? It is uniformly conceded that such a defense as this is a very dishonest one, and that it lies ill in the mouth of the defendant to allege it, and that it is only allowed for public considerations and in order the better to secure the public against dishonest transactions. But that to refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly toward reducing the number of such transactions to a minimum; that the more plainly parties understand that, when they enter into contracts of this nature, they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them, and in that way the public will secure the benefit of a rigid adherence to the law.



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If the writing relied upon by the complainant is only a portion of the agreement that had been made between these parties, as the answer plainly alleges, although their agreement, in the first instance, was by parol, and only certain portions of it were subsequently reduced to writing, as averred and exhibited by that portion of the answer which was stricken out, the whole contract is none the less one and indivisible, just as though it had all been put in writing. If it had all been reduced to writing, the very learned counsel for the complainant would scarcely have argued that his client might maintain an action by relying on that part of the contract which he claimed was valid, and might discard or omit to prove that portion which was illegal. If the contract be as averred in the answer, and the complainant do not prove [331] the whole of it, the defendant could prove it, as well the part lying in parol as that which was reduced to writing, so that the court might, upon an inspection of the whole contract, determine therefrom its character. The unity of the contract is not severed, or its meaning or effect in any degree altered, by putting part of it in writing and leaving the rest in parol. It would seem, therefore, that, in such case, to grant the complainant the relief which it here seeks would be, in substance, to enforce an illegal contract and one which is illegal because it is against public policy to permit it to stand.

What we have thus far presented is adopted almost literally from the opinion of Mr. Justice Peckham in *McMullen v. Hoffman*, 174 U. S. 649, 19 Sup. Ct. 839, 43 L. Ed. 1117. That learned justice had delivered the opinion of the Supreme Court in the cases of *United States v. Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, and *United States v. Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259, and he was later the organ of the court in the case of *Addyston Pipe & Steel Company v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, and in *Montague & Company v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608. In each of the cases cited, but especially in the *Joint Traffic Association Case*, all of the contentions which have been urged on this question in this case were

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exhaustively considered, and, we think, were concluded against the contention of the complainant (appellee).

Soon after the passage of the act of July 5, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], the questions here involved were considered by the Circuit Court in this circuit for the Eastern district of Louisiana, Judges Pardee and Billings sitting at the hearing, on an application for equitable relief very similar to the relief sought in this case. We quote, from the syllabus, the following language:

"Defendant and his partner sold their bakery business to complainant corporation, receiving payment in its stock, and defendant leased to it the premises where the business was conducted, and contracted to carry it on as the purchaser's agent for a salary. After operating under this arrangement for a time, he repudiated the sale, resumed business under the old firm name, and refused to account to complainant. The bill was brought to enjoin him from asserting a hostile claim, for an accounting, and a receiver. Defendant and his partner, as interveners, filed a cross-bill for rescission of the sale, for fraudulent representations, and tendered back the stock. Complainant was practically a 'trust,' organized to monopolize the business, and had already control of 35 leading bakeries in 12 different states. Held, that while a case was made for a receiver, pending litigation between ordinary parties, the prayer would be denied, as equity would not encourage a combination in restraint of trade, and probably illegal, under Act Cong. July 2, 1890, 'to protect trade and commerce against unlawful restraints and monopolies.'" *American Biscuit & Manufacturing Company v. Klotz* (C. C.) 44 Fed. 721.

It is contended for the complainant (appellee) that, if such iniquity exists in the organization of that company as is averred by the answer, the remedy is by direct proceeding by the state to dissolve it, or to punish the guilty parties. In answer to this contention, we commend the parties who make it to a fuller and more unbiased study of the reported decisions we have cited. It is also urged that the United Fruit Company is not a party to this proceeding, and that therefore the matter averred may not be considered in the disposition of this suit. We do [332] not so read the pleadings. The bill was supplemented by the answer. It is the function of the chancellor to look through the form to the substance of the matter in which he is asked to act. Moreover, this suggestion, by a short analysis of its probable practical working, resolves itself into the former contention which, as we

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have indicated, we consider to be settled against the complainant (appellee) by the decisions which we have cited.

The averments of the answer show that the United Fruit Company has combined and dominates substantially all of the other persons, individuals, firms, or corporations engaged in the trade of importing tropical fruits from Central and South America and the Antilles; that there are 25 or more constituent agencies in this combine to monopolize the procuring by production and purchase, and the carriage and distribution to consumers, of these articles in universal use. The United Fruit Company, which dominates all of them, may act only through some one or more of them in its dealings with the public or outsiders. If, therefore, the so-called separate contracts of these numerous constituent agencies can and must be enforced by our courts of law and equity, the public policy of the country which it is so important to protect may indeed be enforced only through the action of the state as a party to a direct proceeding.

The cardinal principles of jurisprudence are as firmly settled as the Ten Commandments and the Roman Tablets, but pleading, practice, and procedure must grow with the growth of civilization and commerce. The present and threatened development of producing, carrying, and trading corporations transcends recorded precedents. Their number, dimensions, and omniverous character have, in large measure, absorbed or devoured individual natural persons having capacity and inclinations for trade, until an action at law or suit in equity is rarely reported which does not show a contest between corporations or by or against a corporation or system of corporations. These unnatural persons, as they may well be called, when legally organized, and while conducting lawful trade in a lawful manner, have the right to judicial protection and relief, in like measure as natural persons enjoy, and are subject to the same legal and equitable limitations. The state may and will bring, in its courts, actions and suits to enforce its statute laws and its public policy against them, when necessity requires, to the extent that time and opportunity permit. But the harvest is great, the laborers are few, and time is short. These parties are wonderfully strong. Age does not impair their strength. They

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perennially recruit it from the highest ranks of the legal profession, with veteran experts in strategy and tactics, both grand and elementary. There are necessary delays in litigation, inherent weaknesses in its best machinery, obstructions will supervene, and all these elements are capitalized to the last extent of their earning capacity, by these highly organized unnatural persons, who decide and act with the promptness and prescience of the most superior human intellect. Direct proceedings by the state are overtaxed. The courts, especially the courts of equity, should not pose always as the fabled goddess, but keep an eye single to these exigent conditions and aid the state, as they rightly may, by withholding help or grace from graceless and hurtful dealings.

[333] Other decisions of the Supreme Court than the leading cases we have cited furnish good reasons for, and illustrations of, the application of the doctrine now deduced from the recent statutes and the ancient common law. *Northern Securities Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679; *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518. A recent case reported from the Circuit Court of Appeals for the Sixth Circuit treats the question we are considering with great ability, and gives the result of the decisions of the Supreme Court with a clearness and force most persuasive to us. *Continental Wall Paper Co. v. Voight & Sons Co.* (C. C. A.) 148 Fed. 939.

We conclude that the lower court erred in sustaining the exceptions to the defendant's answer; that the decree appealed from must be reversed, and the cause remanded to the Circuit Court, with direction to overrule the exceptions, and thereafter to proceed agreeably to equity and the views expressed in this opinion.

And it is so ordered.

## ON REHEARING.

Per curiam. The application for a rehearing is denied. The scope and effect of the decree of reversal is to reinstate the parts of the answer which were stricken out by the circuit court. The record shows exactly the words of the answer, so that the decree cannot be misunderstood.

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## [726] CILLEY v. UNITED SHOE MACHINERY CO.

(Circuit Court, D. Massachusetts. February 13, 1907.)

[152 Fed. Rep., 726.]

**MONOPOLIES—ACTION FOR DAMAGES UNDER ANTI-TRUST LAW—PLEADING.**—In an action under section 7, Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3202], to recover damages for injury alleged to have been caused to plaintiff by reason of contracts made by defendant in restraint of trade or commerce among the several states or with foreign nations, and an attempt by defendant to monopolize such trade or commerce, or a part thereof, in violation of said act, it is not sufficient to frame the declaration in the language of the statute, but the nature and substance of the contracts relied upon, and the substantial facts alleged to constitute an attempt at monopoly must be pleaded to enable the court to determine whether they are in violation of the statute, and to enable the defense to properly prepare to meet the charge.\*

At Law. On demurrer to declaration.

*Merritt and Merritt*, for complainant.*Wm. H. Coolidge and C. A. Hight*, for defendant.

COLT, Circuit Judge.

This is a suit brought under the provisions of Act Cong. July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3202], in which the defendant is charged with making contracts in restraint of trade or commerce among the several states or with foreign nations, and with an attempt to monopolize such trade or commerce, whereby the plaintiff has been injured in his business and property. Section 7 of the act provides as follows:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

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Among the things forbidden or declared unlawful by the act are "every contract \* \* \* in restraint of trade or commerce among the several states or with foreign nations," and every "attempt to monopolize" such trade or commerce.

The case was heard on demurrer to the amended declaration. The grounds of demurrer on which the defendant relies are the following:

"(2) The declaration is insufficient in that it is too uncertain, vague, and indefinite to enable the defendant to know of what it is accused, of what damage the plaintiff has suffered, and to what it should direct its defense.

"(3) The declaration fails to set forth with substantial certainty the substantive facts necessary to show that the defendant has been guilty of anything forbidden or declared to be unlawful by the Anti-Trust Act."

[727] The material averments of the declaration may be summarized as follows: The plaintiff is a manufacturer of shoe machinery, and is engaged in manufacturing and selling a machine for sole leveling and for sole laying, known as the "Universal Leveler." The plaintiff has certain interests in patents on these machines, and is the owner of machines manufactured under these patents. The defendant is engaged both in manufacturing and buying shoe machinery, and now owns and controls the shoe machinery necessary to that part of the manufacture of boots and shoes known as bottoming. The defendant "has made divers contracts and agreements with a great number of manufacturers of boots and shoes, to the plaintiff unknown, throughout the several states and in foreign countries." By the terms of these contracts and agreements, such manufacturers are bound to use no machinery except such as is furnished to them by the defendant. By the terms of these contracts and agreements the use by such manufacturers of the plaintiff's machines is prohibited and prevented if such manufacturers use any one or more of the machines furnished by the defendant. These contracts and agreements are contracts in restraint of trade or commerce among the several states and with foreign nations, and are forbidden by the act of Congress of July 2, 1890. And, further, the defendant, contrary to the provisions of this act, is attempting to monopolize a part of the trade

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or commerce in shoe machinery among the several states, and with foreign nations "by endeavoring by divers means and methods unknown to the plaintiff to compel or induce all manufacturers of boots and shoes throughout the several states, and in foreign countries, to lease or otherwise to acquire shoe machinery from the defendant alone, and to enter with the defendant into contracts and agreements as aforesaid; and by trading and disposing throughout the several states and in foreign countries of certain of its shoe machinery of which it has sole control to the manufacturers of boots and shoes, by means of contracts, agreements, written leases, and other instruments; the terms of which are unknown to the plaintiff, but in which are contained divers agreements and conditions made by and between the defendant and its several customers and lessees substantially as follows, to wit: That the several customers and lessees will thereafter acquire shoe machinery from the defendant alone; that the several customers and lessees will not use any machines acquired from the defendant in any part or process of the manufacture of any boot or shoe if any other part or process of such manufacture shall have been done or performed by or upon any machine not acquired from the defendant," which "contracts, agreements, written leases, and other instruments the defendant, by divers means and methods unknown to the plaintiff, has compelled such manufacturers to execute and the agreements and conditions thereof and therein to observe and keep."

The declaration then alleges that these manufacturers constitute the sole market for the sale of the plaintiff's machines. The declaration further alleges that, by reason of these contracts, agreements, written leases, and other instruments, customers are prevented from buying or leasing the plaintiff's machines, that by these means the plaintiff has been deprived of the right to an open market, and prevented from [728] selling or leasing his property, and that thereby his business has been destroyed, and his property rendered of no value.

It will be observed that the contracts in restraint of trade set forth in the declaration are described as "divers contracts

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and agreements with a great number of manufacturers of boots and shoes throughout the several states and in foreign countries," by the terms of which such manufacturers are bound to use no shoe machinery except such as is furnished by the defendant, and are prohibited from using the plaintiff's machines if they use the machines furnished by the defendant. It will also be observed that the attempt to monopolize trade or commerce set forth in the declaration is described as endeavoring, "by divers means and methods unknown to the plaintiff," to compel all manufacturers to acquire shoe machinery from the defendant alone, or, "by means of contracts, agreements, written leases, and other instruments," to acquire shoe machinery from the defendant alone, and not to use any machines acquired from the defendant if any other part or process in shoe manufacture shall be done on any machine not acquired from the defendant.

It is manifest that these averments are of the most general character. No specific reference is made to any contract or contracts in restraint of trade entered into by the defendant, and no definite description is given of the terms of such contract or contracts. The declaration is also wanting in any definite description of the acts or contracts which constitute an attempt to monopolize trade or commerce. Presumably the defendant has made many contracts with manufacturers, and, before being required to plead, it is entitled to know upon what contracts the plaintiff relies, and the nature of those contracts. So, also, the defendant is entitled to have pointed out the substantial facts upon which the plaintiff bases his allegation of an attempt to monopolize trade or commerce; and, if this attempt to monopolize is founded upon contracts or leases, the material parts of these contracts or leases should be set forth in the declaration.

Again, the declaration alleges that the plaintiff is the owner of certain interests in patents relating to shoe machinery. It also alleges that the defendant owns and controls certain shoe machinery. These and other allegations in the declaration indicate that the defendant's control of shoe machinery is also based upon patents. If the defendant's contracts with manufacturers are based upon patent rights,



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this fact should appear, because contracts with respect to patents are, as a general rule, outside the doctrine of restraint of trade, both at common law and under the federal statute.

In my opinion, the averments in this declaration are too uncertain, vague, and indefinite to enable the defendant properly to prepare its defense, or to enable the court to determine whether the alleged offenses are within the statute.

Under the act of July 2, 1890, it is not sufficient to frame the declaration in the words of the statute. The statute does not set forth the elements of the offenses which are forbidden; and, further, there may be contracts in restraint of trade between the states or with foreign countries, and attempts to monopolize such trade or commerce, which are not within the statute. These circumstances make it imperative [729] that the substance of the contracts in restraint of trade, or the substantial facts which constitute the attempt to monopolize, should be set forth in the declaration. These principles are well settled by the authorities.

In the case of *In re Greene* (C. C.) 52 Fed. 104, 111, Judge Jackson said:

"The act does not undertake to define what constitutes a contract, combination, or conspiracy in restraint of trade, and recourse must therefore be had to the common law for the proper definition of these general terms, and to ascertain whether the acts charged come within the statute."

In *United States v. Patterson* (C. C.) 55 Fed. 605, Judge Putnam said:

"This statute is not one of the class where it is always sufficient to declare in the words of the enactment, as it does not set forth all the elements of a crime. A contract or combination in restraint of trade may be not only not illegal, but praiseworthy; as, where parties attempt to engross the market by furnishing the best goods, or the cheapest. So that ordinarily a case cannot be made under the statute unless the means are shown to be illegal, and therefore it is ordinarily necessary to declare the means by which it is intended to engross or monopolize the market. And by the well-settled rules of pleading it is not sufficient to allege the means in general language, but, if it is claimed that the means used are illegal, enough must be set out to enable the court to see that they are so, and to enable the defense to properly prepare to meet the charge against it."

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In the case of *Rice v. Standard Oil Company* (C. C.) 184 Fed. 464, 465, the court said:

"It is apparent that mere proof that the defendant has entered into a contract or engaged in a combination or conspiracy in restraint of trade or commerce among the several States will not be sufficient to support a cause of action under the seventh section, for there must, in addition thereto, be proof that the plaintiff has, by reason thereof, sustained damage. In his declaration, therefore, the plaintiff must aver not only facts showing such a contract or combination or conspiracy as is declared by the act to be unlawful, but facts showing that by reason of such unlawful thing he has been injured in his business or property."

In *Bement v. National Harrow Company*, 186 U. S. 70, 92, 22 Sup. Ct. 747, 756, 46 L. Ed. 1058, the court said:

"That statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act we have no doubt was never contemplated by its framers."

See, also, *In re Corning* (D. C.) 51 Fed. 205; *United States v. Nelson* (D. C.) 52 Fed. 646; *Otis Elevator Co. v. Geiger* (C. C.) 107 Fed. 131.

Demurrer sustained.

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[864] WHEELER-STENZEL CO. v. NATIONAL WINDOW GLASS JOBBERS ASS'N.

(Circuit Court of Appeals, Third Circuit. February 28, 1907.)

[152 Fed. Rep. 864.]

MONOPOLIES—CONTRACTS AND COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE—COMBINATIONS PROHIBITED.—A declaration alleged that defendant corporation was engaged in purchasing and contracting for the purchase of window glass from the manufacturers for certain named jobbers and wholesale dealers doing business in different states, who owned practically all of defendant's stock and [865] controlled it; that such dealers comprised over 75 per cent of all those in the United States, and sold more than 75 per cent of the window glass sold therein; that up to a certain date they were uncombined, and competed freely with each other and with other wholesale dealers, but that on such date defendant entered

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into a combination and agreement with them and with a manufacturer which owned and operated factories in different states and manufactured 70 per cent of all the window glass made in the United States, by which defendant and such dealers agreed to buy window glass from no other manufacturer unless at materially lower prices, and such manufacturer agreed to sell to no other dealers, except at higher prices than it charged them; that such agreement further limited the quantity of window glass to be purchased by each of such dealers to such as should be arbitrarily fixed by defendant and the manufacturer, and also gave them the power to arbitrarily fix excessive and unreasonable prices which were to be charged retail dealers, which prices such wholesale dealers agreed to observe under penalty of fines to be assessed against and paid by them; that it further restricted and limited the territory within which each of such dealers should sell to retail dealers, the object and effect of such combination and agreement being to restrain interstate commerce in window glass, to destroy competition therein, and to practically monopolize the same, especially in the better grades, which were practically all made by such manufacturer. *Held*, that the declaration charged a contract or combination in restraint of interstate commerce, in violation of the Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202], which, as construed by the Supreme Court, makes unlawful any contract or combination in restraint of such trade or commerce, and not merely those which are in unreasonable restraint of trade and therefore illegal at common law.\*

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Monopolies, § 13.]

**SAME—RIGHT OF ACTION FOR DAMAGES.**—A contract or combination in restraint of interstate commerce, prohibited by Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202], is not merely illegal in the sense that it is not enforceable, but is per se unlawful, and one who is harmed in his business or property by such a contract or combination has suffered a legal injury, within the meaning of section 7 of the act, and is by such section given a right of action therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Monopolies, § 18.]

**SAME—PLEADING.**—Where a declaration sufficiently charges a contract or combination on the part of defendants in restraint of trade and commerce among the States, in violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202], general allegations showing that the result of such contract or combination was to deprive plaintiff of customers, and prevent it from making a profit in its legitimate business as theretofore, are suffi-

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cient to support an action for treble damages, under section 7 of the act.

[Ed. Note.—Rights and liabilities of parties contracting with trusts or combinations in restraint of trade, see note to *Chicago Wall Paper Mills v. General Paper Co.*, 78 C. C. A. 612.]

In error to the Circuit Court of the United States for the District of New Jersey.

*H. P. Lindabury*, for plaintiff in error.

*Theodore W. Morris, jr.*, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge.

This suit was brought by the plaintiff in error in the court below, to recover treble damages, etc., from the [866] defendant in error, under section 7 of the act of Congress, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, commonly called the "Sherman" or "Anti-Trust" act. Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]. The first and seventh sections of this act are those with which we are here concerned, and are as follows:

"SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

"SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the District in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

The declaration contained two counts, one based upon an alleged combination and conspiracy in restraint of trade, contrary to the provisions of the Anti-Trust Act, the other upon an alleged contract or agreement in restraint of trade, likewise contrary to the provisions of said act. In other

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respects, the two counts are the same. The first is sufficiently set forth in the margin.\*

To this declaration, the defendant interposed a demurrer, stating the following grounds therefor:

"(1) The said plaintiff has not in the said declaration or in either of the counts of its said declaration alleged facts showing that it has been injured in its business or property by the said defendant by reason of anything forbidden or declared to be unlawful by the act of Congress of the United States referred to in the said declaration, and entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' approved July 2d, 1890.

"(2) The said plaintiff has not in the said declaration or in either of the counts of the said declaration alleged any fact or facts constituting a violation by the defendant of any provision or provisions of the said act of Congress, or any fact or facts which bring the defendant within the condemnation of, or subject the defendant to any penalty or penalties imposed by the said act, or which in any wise rendered the defendant liable to the plaintiff for any damages.

"(3) The said plaintiff has not in the said declaration, or in either of the counts thereof, alleged any contract, combination in the form of trust or otherwise, or conspiracy made or entered into by the defendant in restraint of trade or commerce among the several states, or with foreign nations in violation of the said act of Congress.

"(4) The said plaintiff has not in the said declaration or in either of the counts of the said declaration alleged any facts showing that the defendant has monopolized or attempted to monopolize, or combined or conspired with any other person or persons to monopolize, any part of the trade or commerce among the several states or with foreign nations, in violation of the said act of Congress.

"(5) The plaintiff has not in the said declaration or in either of the counts of the said declaration, alleged any facts showing that it has suffered any damage by reason of any of the acts or facts complained of in the said declaration.

"(6) That for the reasons and in the particulars aforesaid, the said declara[867]tion does not state facts sufficient to constitute a cause of action against the defendant."

After argument, the demurrer was sustained by the court below, upon the ground that the plaintiff had not, in its declaration, shown that it was injured or had been damaged by any of the acts of conspiracy, combination or agreement stated in the declaration, without referring to the point that the contract, combination or conspiracy set forth in the declaration was not in violation of the anti-trust act, except

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\* See note at end of case.

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to say "that such argument was only incidentally made but not insisted upon." Judgment was rendered by the court sustaining the demurrer, and the writ of error thereto sued out by the plaintiff below brings the record into this court. The assignments of error may be taken as presenting the following questions:

First. Whether, as is contended by defendant in error to be true, the plaintiff fails to allege in the declaration anything forbidden or declared to be unlawful in the so-called anti-trust act, by reason of which any alleged injury or damage has resulted to itself.

Second. Whether, as is contended by defendant in error to be true, the declaration fails to allege or show any legal injury to the plaintiff, and therefore does not state a cause of action either at common law or under the statute.

Third. Whether, as is contended by defendant in error to be true, the declaration fails to state facts showing that the plaintiff sustained any damage whatever by reason of any act of the defendant.

The first of these questions confronts us at the threshold of our inquiry. If the conduct and acts of the defendant, as alleged in the declaration, do not constitute and show on their face a contract, combination or conspiracy, as denounced in the first section of the act of Congress above referred to, then the essential foundation of the action, authorized by the seventh section of said act, is wanting. Turning then to plaintiff's declaration, as set out in the record, do we find a sufficient statement of such a contract or combination? From a careful survey of this pleading, it seems very clear, that the combination or contract complained of, by its obvious scope, and by the exigency of its terms, concerned the purchase and sale of window glass between manufacturers in certain states and dealers in other different states, which is the very definition of trade and commerce among the states. *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; *Montague v. Lowry*, 193 U. S. 38, 47, 24 Sup. Ct. 307, 48 L. Ed. 608.

Indeed this is not here denied. Relating, therefore as it did, to commerce among the states, was the combination or contract described and set out in the declaration, in restraint

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of that trade and commerce within the meaning of section 1 of the act?

The scope of this question has been much narrowed by the later decisions of the Supreme Court. In the early cases in the federal courts, the purpose of the act was held to be applicable only to those contracts which were unlawful at common law, but which require the sanction of a federal statute, in order to be dealt with in a federal court. *U. S. v. Freight Ass'n*, 166 U. S. 290, 327, 17 Sup. Ct. 540, [868] 41 L. Ed. 1007. It was held, therefore, that only such combinations or contracts as were in unreasonable restraint of trade, and therefore at common law illegal, were aimed at by the statute, whose true meaning was in consonance with the language of its title, viz., "An act to protect trade and commerce against unlawful restraints and monopolies." In the case above referred to, however (*U. S. v. Freight Ass'n*), the Supreme Court, speaking by Mr. Justice Peckham, says: "The term " (in restraint of trade and commerce) " is not of such limited signification." Having stated that the language used in the title refers to and includes, and was intended to include, those restraints and monopolies which are made unlawful in the body of the statute, the opinion proceeds:

"Contracts in restraint of trade have been known and spoken of for hundreds of years both in England and in this country, and the term includes all kinds of those contracts which in fact restrain or may restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade, and would be so described either at common law or elsewhere. By the simple use of the term 'contract in restraint of trade,' all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress."

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Every contract or combination, therefore, whether reasonable or unreasonable, which directly restrains or which necessarily operates in restraint of trade or commerce among the states, is denounced and made unlawful by the act. The Supreme Court has also decided that a contract or combination, whose object or necessary result is to destroy competition in whole or in part, in trade or commerce among the states, is in restraint thereof, and therefore within the inhibition of the act. *Northern Securities Co. v. U. S.*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679. In this case, the Supreme Court, by Mr. Justice Harlan, says:

"In all the prior cases in this court, the Anti-Trust Act has been construed as forbidding any combination which, by its necessary operation, destroys or restricts free competition among those engaged in interstate commerce; in other words, that to destroy or restrict free competition in interstate commerce, was to restrain such commerce."

And it was held that such was the proper construction of the act, and that so interpreted it was within the constitutional power of Congress to enact under the commerce clause of the Constitution. The opinion then continues:

"Whether a free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce, is an economic question, which this court need not consider or determine. \* \* \* Be all this as it may, Congress has, in effect, recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce."

[869] It is true that, in this case, the court were dealing with what was held to be a combination between two railway companies, the necessary operation of which would tend to destroy competition between them, as to the rates at which commodities would be carried from state to state. But, if the interpretation given by the Supreme Court to the act is applicable to those who control the mere instrumentalities of interstate commerce, such as common carriers are held to be, a fortiori it is applicable to those who initiate, carry on and control that commerce itself. *U. S. v. Joint Traffic Ass'n*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; *Swift & Co. v. U. S.*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518.



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The declaration is long and somewhat redundant in phraseology and statement. Much of it is taken up with matter of inducement, as that the plaintiff was a wholesale dealer and jobber in window glass, doing business at Boston, a large part of which consisted of trade in window glass among the several states; that the defendant is and was a corporation engaged in purchasing window glass or obtaining contracts for the purchase of window glass for manufacturers in certain specified states, for certain jobbers and wholesale dealers doing business in other states and specified in a list set forth; that these wholesale dealers owned a large majority of the stock in and controlled the defendant corporation; that the American Window Glass Company, up to the time of the combination complained of, owned and operated factories in certain specified states, and sold and delivered its product to wholesale dealers in each of the states, and was thereby engaged in interstate commerce; that the plaintiff had had large dealings with the said American Window Glass Company and imported its product into Massachusetts and sold it in the New England states, where window glass is not manufactured; that the wholesale dealers specified constituted more than 75 per cent. of the jobbers and wholesale dealers in window glass in the United States, and had more than 75 per cent. of the wholesale business; and that, prior to the acts complained of, the wholesale dealers specified were uncombined, and were buying window glass in competition with each other and with other wholesale dealers, and selling such glass in open competition to retail dealers in the several states, including the New England States and New York.

The declaration then proceeds to allege:

"That on the fourteenth day of February in the year nineteen hundred and thereafter continuously until the fourth day of August, in the year nineteen hundred and three, in order unreasonably to restrain trade and commerce in window glass among the several states, and with intent to absorb and monopolize the inter-state trade and commerce in window glass, and to stifle and put an end to competition in such trade; and in order to control and restrict the output, and to control and regulate the prices of window glass manufactured and sold in and among the several states, and to increase and arbitrarily fix the prices at which window glass should be sold in trade and commerce

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among the several states, independent of the natural market price of such glass; and to enable the said wholesale dealers hereinabove named to obtain excessive and unreasonable prices in trade and commerce in window glass among the several states, and to enable these dealers to obtain substantially all the window glass of the best quality manufactured in the United States [870] and prevent all other wholesale dealers and jobbers from obtaining such glass except at unreasonable prices much higher than the prices paid by the said wholesale dealers hereinabove named, the defendant corporation combined and conspired with the American Window Glass Company and with the wholesale dealers hereinabove named, unreasonably to restrain, and in pursuance of this combination and conspiracy, did unreasonably restrain, \* \* \* by restricting the sale of all of the glass manufactured by the American Window Glass Company to the wholesale dealers named as aforesaid, except at unreasonable prices, from two and one-half per cent. to five per cent. higher than the prices charged to these wholesale dealers named as aforesaid, by arbitrarily fixing unreasonable and excessive prices to be charged by these wholesale dealers named as aforesaid, to retail dealers in window glass throughout the United States, by restricting and limiting the quantity of window glass to be purchased by each of the said wholesale dealers hereinabove named to quantities to be arbitrarily determined by the defendant and the American Window Glass Company; by the refusal of the wholesale dealers named as aforesaid to purchase any window glass from any other manufacturer than the American Window Glass Company except at prices at least five per cent. below the prices charged by it, which lower prices were less than the cost of manufacturing such glass; by establishing rules and regulations forbidding the said wholesale dealers hereinabove named from selling window glass to other wholesale dealers at prices lower than the prices fixed under penalty of pecuniary fines to which each of the said wholesale dealers hereinabove named agreed with each other and with the defendant corporation to become liable; by mutually agreeing to refuse to purchase any window glass at any price from any manufacturer who should not close his factories and restrict the output of window glass produced by him at such times and in such manner as such restrictions of output should be arbitrarily imposed by the American Window Glass Company; and by restricting and fixing the territory within which each of the said wholesale dealers hereinabove named should sell window glass to retail dealers, so that none of them should sell to any retail dealer in any other territory except under arbitrary restrictions imposed by the defendant corporation."

We think, in the language quoted, there is sufficiently averred the existence of a contract or combination, to which the defendant was a party, which, by its necessary operation, was in restraint of interstate trade and commerce in window

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glass. It was obviously designed to destroy or minimize competition between certain wholesalers and jobbers in window glass, alleged to be 75 per cent. of the whole number so engaged in the United States, and, in the language of the Supreme Court, "to destroy or restrict free competition in interstate commerce is to restrain such commerce." It is argued with much force and ingenuity by the defendant in error, that the combination set out in the declaration, was only an agreement by which a certain number of wholesalers were to trade exclusively with a certain manufacturer, with the reciprocal understanding that the manufacturer was to sell to no one else, except at a price higher than that paid by the parties to the contract; that this was, in effect, nothing more than an agreement to sell to one person or to several at a price advantageously lower than the general price, on condition that such person or persons would buy exclusively from the manufacturer so agreeing. In other words, the American Window Glass Company had the right to select its customers and charge one price to one and another price to another. It had the right to offer certain inducements to certain customers in exchange for their exclusive trade. And it had the right to do all or any of these things. But it is always to be borne in mind, in considering arguments of this kind, that the act of Congress has [871] made, and was intended to make, illegal, many sorts of contracts and agreements that prior thereto were not only legal, but were regarded as meritorious and beneficial, and has materially restricted the area within which freedom of contract may be exercised.

There is something more, however, set forth in the declaration affecting the character and operation of this contract. Prices to retail dealers were to be arbitrarily fixed by those wholesale dealers, to which prices they were all required to conform. The quantity of glass to be purchased by each of said wholesale dealers was to be arbitrarily determined by the American Window Glass Company, and they were to be prohibited from purchasing from any manufacturer who should not close his factories and restrict the output of glass when and as required so to do by the American Window Glass

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Company. These stipulations clearly tended toward the creation of a monopoly, and if adhered to and carried out, manifestly restricted the scope of competition in the commodity referred to. It may be quite true, that such an agreement would have been valid at common law, or if invalid as to the parties, would not have been illegal, but the act of Congress has affected it with illegality, so far as the trade or commerce restrained by it is interstate in its character. We conclude, therefore, that the contract or combination set out in the declaration is one in violation of the first section of the Anti-Trust Act, and that an action properly accrues under the seventh section to any one who has been injured in his business or property by reason thereof.

We come now to the second question raised by the assignments. It is strenuously insisted by the learned counsel for the defendant, that unless the injury to plaintiff's business or property, alleged in the declaration and for which he brings suit, is a legal injury, plaintiff does not state a cause of action under the statute. At great length, both in oral argument and in defendant's brief, it has been urged that the word "injured," in the seventh section of the statute, is used in a technical sense, and imports an injury as recognized at common law, that is, as a harm inflicted by commission of a wrong or tort; that injury and damage are different legal concepts, and the one should not be confounded with the other. Abstractly, this is all true, and the phrase, "damnum absque injuria," so often recurring in legal discussion, serves to emphasize the distinction on which defendant's counsel insists. In support of the proposition, that no legal injury resulting to the plaintiff, by reason of defendant's violation of the Anti-Trust Law, has been or can be alleged by plaintiff, it is contended that at common law, agreements in restraint of trade, however clearly established, unless unreasonable in themselves, were not illegal, and if no unlawful means were practiced to carry them into execution, no action accrued to one who claims to have been harmed thereby. This is the doctrine of *Mogul Steamship Co. v. McGregor* (as finally decided in the House of Lords, in December, 1891) L. R. App. Cas. (1892) p. 25. It will be

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remembered that that celebrated case grew out of the formation, by a number of ship owners, of an association, to secure, at profitable rates exclusively for themselves, the carrying trade from Chinese ports to Europe. This was to be accomplished, in part, by a rebate of five per cent. on freights to all shippers who [872] shipped exclusively with members of the association, it being announced that any one, even though usually a shipper in ships of the association, who employed the ship of any outside owner, should not be entitled to the rebate during a certain period. It was also agreed that the association should send ships to any port where the ships of outside owners were seeking cargoes, and by lowering rates to an indefinite extent, even though cargoes had to be carried at a loss, drive out of business the competing vessels. One of such competing owners brought his action against the members of the association, on the ground that their agreement, being in restraint of trade, was an unlawful one, and that therefore a private injury suffered by plaintiff, by reason thereof, was actionable. The facts involved were not unlike those in the present case. The Lord Chancellor and the judges were unanimous in the judgment delivered by them to the House of Lords. They all concurred in the opinion that, though the contract was in restraint of trade, and might be illegal in the sense that it was not enforceable at law—was invalid *inter sese*—it was not unlawful or illegal in the stricter sense of those words, and that no action accrued to one who suffered loss thereby, unless the means used to enforce the agreement was itself unlawful; such as fraud, misrepresentation, physical compulsion, or the persuading of another to break a binding contract. The following language used by Lord Chancellor Halsbury, in delivering his opinion in the House of Lords, will exhibit in part the reasoning upon which plaintiff was held to have suffered no injury or actionable loss or harm:

"A totally separate head of unlawfulness has, however, been introduced by the suggestion that the thing is unlawful because in restraint of trade. There are two senses in which the word 'unlawful' is not uncommonly, though I think somewhat inaccurately used. There are some contracts to which the law will not give effect; and therefore, although the parties may enter into what, but for the element which

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the law condemns, would be perfect contracts, the law would not allow them to operate as contracts, notwithstanding that, in point of form, the parties have agreed. Some such contracts may be void on the ground of immorality; some on the ground that they are contrary to public policy; as, for example, in restraint of trade; and contracts so tainted the law will not lend its aid to enforce. It treats them as if they had not been made at all. But the more accurate use of the word 'unlawful,' which would bring the contract within the qualification which I have quoted from the judgment of the Exchequer Chamber, namely, as contrary to law, is not applicable to such contracts."

He adds:

"It has never been held that a contract in restraint of trade is contrary to law in the sense that I have indicated."

Lord Bramwell states his position thus:

"I think, upon the authority of *Hulton v. Eckersley*, 6 E. & B., 47, and other cases, we should hold that the agreement was illegal, that is, not enforceable by law. But that is not enough for the plaintiffs. To maintain their action on this ground, they must make out that it was an offence, a crime, a misdemeanor. I am clearly of opinion it was not. Save the opinion of Crompton, J. (entitled to the greatest respect, but not assented to by Lord Campbell or the Exchequer Chamber), there is no authority for it in the English law."

It was held, therefore, that the plaintiff had suffered no legal injury, and that no action would lie. The much argued and interesting case [873] of *Allen v. Flood*, L. R. A. C. (1898) 1, though differing in its facts from the case at bar, illustrates to some extent the general doctrine, that, however harmful to others individual or combined action may be, if it is not unlawful, the damage or harm so inflicted does not constitute legal injury at common law.

But it does not follow, as is argued by defendant that it does, that, because at common law contracts and combinations in restraint of trade were only illegal in the sense of being unenforceable, as being contrary to public policy, and that private wrongs cannot be predicated thereon, proper legislative authority has not, by making such contracts and combinations absolutely unlawful, created a right of private action in one who has suffered in business or property thereby, even though such damage or loss would not have been actionable at common law. There is the implication in all the judgments delivered in *Mogul Steamship Co. v. McGregor*, *supra*,

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that it is because agreements in restraint of trade are not per se unlawful, that, apart from unlawful means in carrying them out, no private rights of action can be predicated thereon, but that if such combinations were illegal, in the strict sense of that word, and constituted a public wrong, whether by common law or by statute, one who incurred substantial loss thereby suffered a legal injury for which a private action would lie. Of course the result must be the same, whether the public offense or misdemeanor exists by virtue of common law or statute. In either case, it exists by law. The defendant argues that, although the first six sections of the statute provide that such contracts or combinations shall not only be illegal and void, as they were at common law, but also constitute crimes against the United States, yet there is absolutely nothing in them referring in any way to private rights or private remedies, and that section seven, while it gives a private right of action, does so only where violation of the preceding sections results in a legal injury at common law to the plaintiff, and that nothing in this section can possibly be construed into making such contracts and combinations themselves wrongs or torts against the person who suffers harm thereby; that it is only where there has been such an injury, some tort or breach of contract resulting from the public offense, that the party injured may recover the three fold damages authorized in section seven. But so far as the right of action is concerned, that must be based upon an individual legal injury just as at common law. There is an obvious fallacy in this reasoning. Private actionable injury could not be predicated on such combinations in restraint of trade, as were considered in *Mogul Steamship Company v. McGregor*, for the reason, as we have seen, that such agreements were not criminal or unlawful by the common law; but such combinations, so far as they affect interstate commerce, are both unlawful and criminal by the statute law of the United States. It would seem, therefore, that the conclusion is obvious and unavoidable, that the private right of action in the latter case must be commensurate with the extent of the illegality thus by law established. In a common-law jurisdiction, express statutory provision of a right of

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action for damage resulting from a violation of law, would not have been necessary. Whether because of the want of common-law jurisdiction in federal courts, or [874] whatever may have been the reason for so doing, Congress has seen fit expressly to create a private right of action for one injured by reason of the violation of the act. The principle that every man has a right to insist that no provision of any law shall be violated, so as to work peculiar harm to him (with, perhaps, the qualification that the harm resulting from the breach of a statutory duty must be of the kind which the statute was intended to prevent), is well stated by Bishop on "Non-Contract Law," § 132:

"Whenever the law, a statute, a municipal by-law, or any other law, imposes on one a duty, if of a sort affecting the public within the principles of the criminal law, a breach of it is indictable, and a civil action will lie in favor of any person who has suffered especially therefrom."

It is manifestly the correct understanding of the seventh section of the act, that where a man is harmed in his business or property by a violation of the act, he has suffered a legal injury and is entitled to his action therefor. All this seems to have been recognized in the very recent opinion of the Supreme Court of the United States, in *Chattanooga Foundry and Pipe Works et al. v. City of Atlanta*, 27 Sup. Ct. 65, 203 U. S. 390, 51 L. Ed. 241. In speaking of the plaintiff below, which had brought its action under section seven of the act (the facts being very like those of the present case) Mr. Justice Holmes, who delivered the opinion of the court, says:

"It" (meaning the plaintiff) "was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced, is injured in his property."

Little need be said as to the third point made by the defendant, viz., that no facts were alleged, showing that the plaintiffs sustained any damage whatsoever, by reason of any act of the defendant. Examination of the declaration in



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this regard does not sustain the defendant's contention. The gravamen of defendant's criticism is, that sufficient facts are not alleged to show that plaintiffs could not have purchased all the glass it required from the American Window Glass Company. But plaintiff has alleged the contrary in its declaration, and is not required to plead the evidence in support thereof. The same may be said as to the criticism, that there is nothing to show that it could not have procured all the glass it required, and have sold such glass to its customers at the same price as before, nor is it necessary, as urged by defendant, that plaintiff should allege that defendant, or the dealers represented by defendant, attempted to deprive it of its business, by offering lower prices to its customers. It is enough, that plaintiff charges that the result of the illegal combination was to deprive it of customers and prevent its making a profit upon its legitimate business, as theretofore existing. If, as we have found, a contract or combination in restraint of trade and commerce among the states has been sufficiently charged, we think the plaintiff has met the requirements of the law in the declaration, by the general statement made of damage to itself by reason thereof. The declaration might have been more specific, but if the illegal contract or combination has been stated with the requisite clearness, the statements of [875] the damage are not too general to lay ground for the evidence, if any there be, of the particulars of which it consisted. It is hard to see how the plaintiff should be required to be more specific in its allegation, that the effect of the illegal combination was to deprive the plaintiff of its entire business in the kind of window glass which its customers chiefly require, and to deprive it of all its customers whose names are given in the declaration, and of their trade, which, as already alleged, was interstate in its character, or that by means of said combinations, the plaintiff's business was destroyed and it rendered insolvent. As matter of pleading, these allegations are sufficiently clear and precise, and with the evidence to be offered in their support we are not now concerned.

For the reasons stated, we think the judgment below must be reversed.

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## NOTE.

The National Window Glass Jobbers' Association, a corporation duly organized and existing under and by virtue of the laws of the state of New Jersey, a citizen of said state and resident of said district, the defendant in this suit was summoned in an action in tort to answer unto the plaintiff, the Wheeler Stenzel Company, wherein the plaintiff demands three hundred thousand dollars, damages, and thereupon, the plaintiff, by Vreeland, King, Wilson and Lindabury, its attorneys, complains.

For that whereas, heretofore, to wit, on the fourteenth day of February, in the year nineteen hundred, at Boston, in the commonwealth of Massachusetts, to wit, at Jersey City, New Jersey, in said district, the plaintiff was a wholesale dealer and jobber in window glass, having its place of business at Boston, in the commonwealth of Massachusetts. A large part of its business consisted of trade and commerce in window glass among the several states. It purchased such window glass from manufacturers located and doing business in the states of Indiana, Pennsylvania, New York and New Jersey, and obtained delivery thereof to it at Boston, and sold and delivered this glass to its customers who were retail dealers doing business in the States of Maine, New Hampshire, Vermont, Rhode Island, Connecticut and New York and the commonwealth of Massachusetts. A list of these customers and their respective places of business is as follows, to wit:

(Here follows list of 33 persons, firms and corporations in 7 states.)

That the defendant is and has been from the time of its organization, a corporation engaged in the business of purchasing, or obtaining contracts for the purchase of, window glass from manufacturers in the states of Indiana, Pennsylvania, New York and New Jersey, for the benefit of certain jobbers and wholesale dealers in window glass, doing business in various states. A list of these dealers and their respective places of business, so far as known to the plaintiff, is as follows, to wit:

(Here follows list consisting of 53 persons, firms and corporations, residing and doing business in 14 different states.)

A large majority of the shares of stock in the defendant corporation was owned by the wholesale dealers named as aforesaid, who were thereby enabled to control, and did control, the defendant corporation. The principal part of the defendant's business from the fourteenth day of February in the year nineteen hundred to the fourth day of August, in the year nineteen hundred and three, was the making of contracts for the benefit of these wholesale dealers by which the American Window Glass Company agreed to sell and deliver to these wholesale dealers window glass in large quantities, to be received and paid for them respectively, and to be transported by rail from the several factories of the American Window Glass Company to the places of business of these dealers. In accordance with such

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contracts between the defendant corporation and the American Window glass Company, large quantities of window glass, amounting to more than two million boxes were sold in each [876] year during this period by the American Window Glass Company and transported by rail to these dealers at their respective places of business.

That on the said fourteenth day of February in the year nineteen hundred, the American Window Glass Company was and has ever since continued to be, a corporation organized under the laws of Pennsylvania, engaged in manufacturing window glass. Prior to that date it has acquired and has ever since owned and operated window glass factories and plants, located and doing business in the states of Indiana, Pennsylvania, New York and New Jersey, and throughout the period during which the acts complained of occurred, produced a large proportion, exceeding seventy per cent. of the window glass manufactured in the United States, and sold and delivered the glass manufactured by it to wholesale dealers in each of the states, and was engaged in trade and commerce in window glass among the several states.

That window glass is a staple article of trade and commerce among the several states. The window glass used in the commonwealth of Massachusetts and the states of Maine, New Hampshire, Vermont, Rhode Island and Connecticut is not manufactured in those states, but is purchased in and transported from other states, and a large part of it, exceeding seventy per cent., is purchased from the American Window Glass Company.

That prior to the fourteenth day of February, in the year nineteen hundred, the plaintiff and its predecessors in business had for many years purchased large quantities of window glass from the American Window Glass Company and its predecessors in its business, exceeding two hundred thousand boxes in each year and imported the glass so purchased into the commonwealth of Massachusetts, and sold it in that commonwealth and in the states of Maine, New Hampshire, Vermont, Rhode Island, Connecticut and New York, to its customers, hereinabove named, and had an established business of interstate trade and commerce in so purchasing window glass and selling it to its customers in other states, and realized large gains and profits thereby, to wit, the sum of one hundred thousand dollars in each year.

That the wholesale dealers named as aforesaid constituted more than seventy-five per cent. of the jobbers and wholesale dealers in window glass in the United States and did more than seventy-five per cent. of the wholesale business in window glass in the United States. The American Window Glass Company manufactured and sold practically all the window glass of the better grades manufactured in the United States and controlled the production and sale to wholesale dealers of glass of those grades. Prior to the acts of the defendant herein complained of, a very large proportion of the glass bought and sold by the plaintiff was glass of those grades, and it required in its

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business large quantities of glass of those grades for sale and delivery to its customers, hereinabove named, and was unable to obtain any considerable quantity of glass of those grades except from the American Window Glass Company or its predecessors in its business; and the plaintiff and its predecessors in its business had purchased large quantities of window glass exceeding two hundred thousand boxes per year from the American Window Glass Company and its predecessors in its business, a large part, exceeding seventy-five per cent. of which was of the better grades manufactured in the United States only by the American Window Glass Company.

That prior to the acts herein complained of, the said wholesale dealers hereinabove named were uncombined and were purchasing window glass in competition with each other and with the plaintiff and other wholesale dealers, and selling such glass in open competition to retail dealers in the several states, including Massachusetts, Maine, New Hampshire, Vermont, Rhode Island, Connecticut and New York and the American Window Glass Company and other manufacturers were selling window glass to the plaintiff and to the said wholesale dealers named as aforesaid and to all other wholesale dealers, as competing jobbers and by separate contracts, and the American Window Glass Company and all other manufacturers of window glass were competing with each other for the trade of the plaintiff and the said wholesale dealers hereinabove named and of all other wholesale dealers.

That on the fourteenth day of February in the year nineteen hundred and thereafter continuously until the fourth day of August in the year nineteen hundred and three, in order unreasonably to restrain trade and commerce in [877] window glass among the several states, and with intent to absorb and monopolize the inter-state trade and commerce in window glass, and to stifle and put an end to competition in such trade; and in order to control and restrict the output, and to control and regulate the prices of window glass manufactured and sold in and among the several states, and to increase and arbitrarily fix the prices at which window glass should be sold in trade and commerce among the several states, independent of the natural market price of such glass; and to enable the said wholesale dealers hereinabove named to obtain excessive and unreasonable prices in trade and commerce in window glass among the several states, and to enable these dealers to obtain substantially all the window glass of the best quality manufactured in the United States and prevent all other wholesale dealers and jobbers from obtaining such glass except at unreasonable prices much higher than the prices paid by the said wholesale dealers hereinabove named, the defendant corporation combined and conspired with the American Window Glass Company and with the wholesale dealers hereinabove named, unreasonably to restrain, and in pursuance of this combination and conspiracy, did unreasonably restrain, from the fourteenth day of February, nineteen hundred, to the fourth day of February, nineteen hundred and three,

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trade and commerce in window glass among the several states, including the states of Massachusetts, Maine, New Hampshire, Vermont, Rhode Island, Connecticut and New York, by restricting the sale of all of the glass manufactured by the American Window Glass Company to the wholesale dealers named as aforesaid, except at unreasonable prices, from two and one-half per cent. to five per cent. higher than the prices charged to these wholesale dealers named as aforesaid, by arbitrarily fixing unreasonable and excessive prices to be charged by these wholesale dealers named as aforesaid, to retail dealers in window glass throughout the United States, by restricting and limiting the quantity of window glass to be purchased by each of the said wholesale dealers hereinabove named to quantities to be arbitrarily determined by the defendant and the American Window Glass Company; by the refusal of the wholesale dealers named as aforesaid to purchase any window glass from any other manufacturer than the American Window Glass Company except at prices at least five per cent. below the prices charged by it, which lower prices were less than the cost of manufacturing such glass; by establishing rules and regulations forbidding the said wholesale dealers hereinabove named from selling window glass to other wholesale dealers at prices lower than the prices fixed under penalty of pecuniary fines to which each of the said wholesale dealers hereinabove named agreed with each other and with the defendant corporation to become liable; by mutually agreeing to refuse to purchase any window glass at any price from any manufacturer who should not close his factories and restrict the output of window glass produced by him at such times and in such manner as such restrictions of output should be arbitrarily imposed by the American Window Glass Company; and by restricting and fixing the territory within which each of the said wholesale dealers hereinabove named should sell window glass to retail dealers, so that none of them should sell to any retail dealer in any other territory except under arbitrary restrictions imposed by the defendant corporation.

The combination and conspiracy thus entered into between the defendant, the American Window Glass Company, and the said wholesale dealers hereinabove named was in restraint of trade and commerce in window glass among the several states, including the states in which the American Window Glass Company manufactured glass as herein alleged, the states in which the wholesale dealers named as aforesaid had their respective places of business, and the states of Massachusetts, Maine, New Hampshire, Vermont, Rhode Island, Connecticut and New York, and was and is forbidden and declared to be unlawful by an act of Congress of July second, eighteen hundred and ninety entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

That on the fourteenth day of February in the year nineteen hundred and frequently thereafter until the fourth day of August in the year nineteen hundred and three, the plaintiff endeavored to purchase

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from the American Window Glass Company glass manufactured by it; but the American Window Glass Company on that date refused, and throughout said period continued to [878] refuse, in pursuance of the combination and conspiracy entered into by it with the defendant corporation and the said wholesale dealers hereinabove named to sell any window glass to the plaintiff except at unreasonable prices, largely in excess of the prices charged by it to the said wholesale dealers hereinabove named, and the plaintiff also frequently during the period named endeavored to purchase window glass from the defendant corporation; but the defendant, pursuant to the combination and conspiracy above referred to, refused, and during all this period, continued to refuse to sell any window glass to the plaintiff and the plaintiff was unable during this period to purchase any window glass from any of the said wholesale dealers hereinabove named except at the same prices charged by them to retail dealers; and, as a very large proportion of the glass dealt in by the plaintiff was of the quality and grades manufactured in the United States only by the American Window Glass Company, the plaintiff was unable to obtain glass of the quality and grades required to supply its customers, and thereby, during the period above named, lost a very large part of its trade and commerce in window glass among the several states, including the trade and custom of its customers named as aforesaid.

That the direct and immediate effect of this combination and conspiracy, during the entire period specified, was unreasonably to restrain trade and commerce in window glass among the several states, including all the states hereinbefore named, in the manner and by each of the means above stated; to restrict the output and curtail the production of window glass throughout the United States; to fix arbitrary and excessive prices charged to retail dealers, to stifle competition among the said wholesale dealers hereinabove named for the trade of retail dealers in window glass, and between the American Window Glass Company and other manufacturers of window glass for the trade of all wholesale dealers in window glass; to increase the price of glass to retail dealers and consumers; and to give the American Window Glass Company the complete control and virtual monopoly of the manufacture and give the said wholesale dealers hereinabove named a virtual monopoly of the sale and distribution of window glass manufactured in the United States, and a practically complete control and monopoly of the entire trade and commerce in window glass among the several states, including the states of Massachusetts, Maine, New Hampshire, Vermont, Rhode Island, Connecticut, and New York.

That the direct and immediate effect of this combination and conspiracy upon the plaintiff during the entire period above named was unreasonably to restrain its trade and commerce among the several states by restraining its business of purchasing window glass and selling window glass to its customers named as aforesaid, in the states

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of Maine, New Hampshire, Vermont, Rhode Island, Connecticut and New York and the commonwealth of Massachusetts; to prevent it from purchasing window glass of the kind chiefly required in its business, except at unreasonable prices, in excess of those charged to its competitors, the wholesale dealers named as aforesaid to prevent it from obtaining any window glass of the kind chiefly required by its customers heretofore named, as all of the window glass of those grades produced in the United States was manufactured by the American Window Glass Company; to stifle and destroy competition which before had been open and unrestricted, between it and its competitors, the wholesale dealers as aforesaid and to give them the absolute control and monopoly of the trade and commerce among the several states in window glass of the grades chiefly required in the business of the plaintiff to deprive the plaintiff of its entire business and trade in the United States above named and elsewhere, in the kind of window glass principally required by its customers; to prevent it from purchasing window glass of the quality and grades required to supply its customers, except at unreasonable and excessive prices, and to deprive it of all its customers named as aforesaid, and of their trade and custom; and by all these means to destroy the business of the plaintiff and prevent it from conducting its business at a profit and to render it insolvent.

## [24] JOHN D. PARK &amp; SONS CO. v. HARTMAN.\*

(Circuit Court of Appeals, Sixth Circuit. March 14, 1907.)

[153 Fed. Rep., 24.]

**MONOPOLIES—CONTRACTS IN RESTRAINT OF TRADE—SALE OF ARTICLE MADE BY SECRET PROCESS.**—The exemption from the common-law rule against monopoly and restraint of trade, and the provisions of the federal Anti-Trust Act of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), which has been extended to contracts affecting the sale and resale, the use or the price of articles made under a patent, or productions covered by a copyright, does not extend also to articles made under a secret process or medicine compounded under a private formula.<sup>b</sup>

**SAME—PROPERTY RIGHTS—SECRET PROCESS OR FORMULA.**—While the owner of a patent or copyright is protected in his exclusive right by the statute which gives him a monopoly, there is no statute which protects one who makes or vends an article which is made by a secret process or private formula, nor, so long as he keeps his

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\* For opinion of Circuit Court see 145 Fed. Rep. 358, vol. 2, p. 999.

<sup>b</sup> Syllabus copyrighted, 1907, by West Publishing Company.

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process secret, can he bring himself within the principle of the statute which grants a temporary monopoly in consideration of the full publication of the invention or work.

**CONTRACTS IN RESTRAINT OF TRADE—SALE OF ARTICLES MADE BY SECRET PROCESS.**—The owner of a secret process or formula is not protected by law in his secret, but he may protect himself by contract against its disclosure by one to whom it is communicated in confidence, or restrict its use by such person, and such contracts are not in restraint of trade because of the character of the property right in the secret which would be destroyed by its disclosure, and because it is not in itself an article of commerce, but such considerations do not apply to contracts for the sale of the manufactured product which do not involve a disclosure of the secret, and such contracts are within the rules against restraint of trade.

**SAME.**—The fact that an article of commerce is sold under a trade-name or in a trade dress affords it no exemption from the common-law or statutory rules against restraint of trade.

**SAME.**—The sole manufacturer of a medicine made in accordance with a secret formula, but unpatented, sold the same only under a system of contracts between himself and wholesale dealers to whom alone he sold at uniform prices, by which they bound themselves to sell at a certain price [25] and only to retail dealers designated by him, and between him and such retail dealers, by which in consideration of being so designated they bound themselves to sell to consumers only and at a certain price. Such contracts had been entered into as the manufacturer alleged by a large majority of the wholesale and retail druggists in the United States. *Held*, that such system of contracts was prima facie illegal both at common law as in unreasonable restraint of trade and under the Federal Anti-Trust act of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 8200]), where it affected interstate sales; its purpose and effect being to prevent competition between purchasers of the medicine both wholesale and retail, and that, in the absence of allegation of facts showing it to be necessary for the protection of the manufacturer's business, a court of equity would not aid in the enforcement of the contracts by granting an injunction to prevent a defendant, who was not a party thereto, from buying the medicine from purchasers who were, and reselling the same at any price it might see fit.

[*Ed. Note.*—Rights and liabilities of parties contracting with trusts or combinations in restraint of trade, see note to *Chicago Wall Paper Mills v. General Paper Co.*, 78 C. C. A. 612.]

6. **SAME—SINGLE CONTRACT.**—A single contract, although it be such as, taken alone, may not be within the rule at common law against contracts in restraint of trade, which is one of a great number of identical contracts made between the producer of an unpatented



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article of commerce and dealers therein, forming a "system" of contracts, which, taken as a whole, materially affects the public interests by stifling competition and trade in said article, is an unreasonable restraint, and within the rule at common law against contracts in restraint of trade, if, from an examination of the workings of the whole system, it appears that the restraint is actually, though not ostensibly, the main result and object of the system of contracts, and not merely ancillary or incidental to another and legitimate object.

Appeal from the Circuit Court of the United States for the Eastern District of Kentucky.

For opinion below, see 145 Fed. 358.

The plaintiff below is a manufacturer of certain proprietary medicines, the chief of which is the well-known article called "Peruna." This, together with other preparations, he puts on the market through a system of contracts intended to maintain prices. Thus it is averred that he sells only to jobbers or wholesalers at uniform prices with a discount varying according to quantity. Each such jobber is required to sign a written agreement to sell only to retailers whose names shall be furnished by complainant, and who shall have signed a retailer's agreement with him obligating them to sell only to consumers at a price named by the complainant or found on his labels and wrappers. To enable him to discover violations of the agreement to sell only for consumption and only to consumers, each such retailer is required to stamp or write his name on each bottle or package sold, and, to insure against sales by wholesalers to unlicensed retailers, each sale must be reported to the complainant. The averment is that there has grown up a very large demand for "Peruna," and that such contracts have been made with jobbers and wholesalers all over the United States, and that "a majority of the retail druggists of the country have executed such contracts."

The defendant is a corporation organized under the laws of Kentucky, and is engaged in the jobbing or wholesale drug and proprietary medicine business. It is charged that the defendant company, with full knowledge of complainant's method of contracting the sales of "Peruna," has refused to enter into any contract with the complainant, and is not therefore entitled "to buy or deal in your orator's medicines and remedies." It is then averred that defendant company, in combination with other wholesalers and retailers, who have refused to sign complainant's contracts, has "unlawfully and fraudulently obtained and procured your orator's remedies and medicines, including 'Peruna,' from your orator's wholesale and retail agents, both directly and indirectly, by means of false and fraudulent representations and by surreptitious and dishonest methods, and by persuading, directly or indirectly, your orator's wholesale and retail agents, under contract with your orator as aforesaid, to violate

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and break said contracts and sell and supply your orator's remedies and medicines, including 'Peruna,' to said defendant, and, after having procured" same, has advertised and sold same to dealers at less than the established price and less than the jobbing prices. It is also averred that, for the purpose of rendering it difficult to trace such purchases, the defendant, obliterates the serial number placed in such carton, and defaces and takes off the distinctive wrappers, etc., and in that condition sells the same. All of which conduct is averred to have resulted in "irreparable injury and damage" to complainant's system of trade, and that defendant gives out that it will continue its said conduct. The prayer of the bill is that the defendant be enjoined "from in any manner inducing or persuading, or attempting to procure, induce or persuade, directly or indirectly" any breach of any such sales agreement as stated, "and from procuring or attempting to procure in any way your orator's remedies and medicines, directly or indirectly, from any wholesaler or retailer who has executed such wholesale or retail agency contract with your orator in violation of same," and "from advertising, selling, or offering for sale the remedies and medicines of your orator obtained in or by any of the means aforesaid at prices less than the established retail price thereof, or to wholesale or retail dealers who have not entered into wholesale or retail contracts with your orator," and from mutilating or removing the cartons, wrappers, or labels upon the bottles, etc. The usual prayer for an accounting concludes the bill.

The defendant demurred for want of equity and specially to so much of the bill as sought to enjoin the defendant from mutilating labels, cartons, or wrappers, etc. The demurrers were overruled, and an injunction awarded pendente lite in the very terms of the bill.

From this interlocutory injunction this appeal has been perfected.

*Alton B. Parker, William J. Shroder, and Henry T. Tay,*  
for appellant.

*Frank F. Reed, Edward S. Rogers, and Frederick W. Hinkle,*  
for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The system of contracts by means of which the complainant proposes to retain control of all sales and resales of its goods is not unique. It was first applied to commodities made under patents or productions covered by copyright. According to one of the averments of the bill, the same system of contracts has been generally adopted by the whole-

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sale and retail druggists of the United States. But this, we take it, means no more than it has been adopted as a plan for maintaining prices and controlling sales of proprietary medicines, a business which amounts to more than \$60,000,000 annually. That the same plan has been extended to sales in respect to other commodities, not coming under the peculiar claims advanced for "patent" medicines, we may take notice. The question, in its shortest form, is whether the exemption from common-law rules against monopoly and restraints of trade, and the provisions of the federal anti-trust act, which has been extended to contracts affecting the sale and resale, the use or the price of articles made under a patent or productions covered by a copyright, extend also to articles made under a secret process or medicine compounded under a private formula. The fundamental position of counsel for the complainant is that in principle there is no distinction between the monopoly secured to a patent or copyright and the monopoly of a trade secret, and they advance and defend the claim that articles made [27] under patents, copyrights, and trade secrets may lawfully be contracted for and sold under any conditions and limitations with respect to price and subsales which the vendor chooses to impose, and that "contracts relating to any such articles are not within the restraint of trade rules." If this contention is sound, the contracts under which the complainant conducts his business are legal, and no question remains but a consideration of the matter of the relief equity may give against one not a party to such contracts under the facts of this case.

That articles made under patents may be the subject of contracts by which their use and price in subsales may be controlled by the patentee, and that such contracts, if otherwise valid, are not within the terms of the act of Congress against restraints of interstate commerce or the rules of the common law against monopolies and restraints of trade, is now well settled. *Heaton-Peninsular Button Co. v. Eureka Specialty Co.*, 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728; *Dickerson v. Tintling*, 84 Fed. 192, 28 C. C. A. 139; *Edison Phonograph Co. v. Kaufmann* (C. C.) 105 Fed. 960; *Edison Phonograph Co. v. Pike* (C. C.) 116 Fed. 863; *Rupp et al. v.*

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*Elliott*, 181 Fed. 780, 65 C. C. A. 544; *Victor Talking Machine Co. v. The Fair*, 123 Fed. 428, 61 C. C. A. 58; *Bement v. National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058. The patent grants an exclusive right to use, to make, and to sell. The patentee may grant, if he will, an unrestricted right to make and sell or use the device embodying his invention, or may grant only a restricted right in either the field of making, using, or selling. To the extent that he restricts either one of these separable rights, the article is not released from the domain of the patent, and any one who violates the restrictions imposed by the patentee, with notice, is an infringer. This is the ground upon which the cases stand which uphold restrictions upon either use or sale of a patented article where infringement is alleged. But, when a patentee imposes such restrictions, they may likewise constitute a contract between the patentee and his direct vendee or licensee. In such case the patentee would have a double remedy—an action in tort for infringement, or an action for the breach of the contract. The double remedy in such circumstances is noticed in *Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728, and in *Victor Talking Machine Co. v. The Fair*, 123 Fed. 424, 61 C. C. A. 58. In *Bement v. National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, the action was one for breach of a contract by which the patentee had suffered his invention to be used on condition that the articles embodying it should not be sold below a certain price. In *National Phonograph Co. v. Schlegel*, 128 Fed. 733, 64 C. C. A. 594, the bill was not to restrain infringement, but to enjoin sales by a vendee who was a jobber and who by direct contract had purchased phonographs made under the patent, agreeing to sell only at a named price and only to retailers who signed an agreement regulating retail sales. Whether a remedy is sought for the violation of restrictions placed by a patentee, upon either the use or the sale of an article made under the patent, is in tort or in contract, the rules of the common law in respect of monopolies and restraints of trade have no application, because the very object of [28] the patent law is to give to

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the patentee an exclusive monopoly in using, making, and selling the device which embodies the invention, and this exclusive right he may exercise by contracts under which he reserves to himself so much of his exclusive right as he does not elect to sell or assign or license. It follows therefore that contracts restraining subsequent sales or use of a patented article which would contravene the common-law rules against monopolies and restraints of trade, if made in respect of unpatented articles, are valid because of the monopoly granted by the patent. *Bement v. National Harrow Co.*, 186 U. S. 70, 91, 93, 22 Sup. Ct. 747, 46 L. Ed. 1058; *Edison Phonograph Co. v. Kaufmann* (C. C.) 105 Fed. 960; *Edison Phonograph Co. v. Pike* (C. C.) 116 Fed. 863; *Victor Talking Machine Co. v. The Fair*, 123 Fed. 424, 61 C. C. A. 58. In the *Bement Case*, cited above, the action was at law to recover liquidated damages for the breach of a contract in respect of the price at which articles made under a patent should be sold. The court, among other things, said:

"The very object of these laws is monopoly, and the rule is, with very few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal."

In regard to the provision in respect to price the court said:

"The provision in regard to the price at which the licensee would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property in, and providing for its value as far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article."

It was urged in the same case that the stipulations restricting the price at which sales might be made was in violation of the act of Congress of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), upon the subject of trusts

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and restraints of interstate trade, but the court held that the act did not apply to contracts in relation to patented articles, saying:

"But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the licensee or assignee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act we have no doubt was never contemplated by its framers."

In *National Phonograph Co. v. Schlegel*, 128 Fed. 733, 64 C. C. A. 594, the same reasoning was followed and the validity of an agreement restraining prices held to be a valid contract, because it related to a patented article. There are such wide differences between the right of multiplying and vending copies of a production protected by the copyright statute and the rights secured to an inventor under the patent statutes that the cases which relate to the one subject are not altogether controlling as to the other. See *Bobbs-Merrill Co. v. [29] Straus* (C. C. A.) 147 Fed. 15, 23. Nevertheless, the statutory right to exclusively publish and vend copies of a copyrighted production would seem to take direct contracts between the publisher and his vendees in respect to the price at which subsequent sales shall be made outside of the rule as to restraints of trade which might otherwise apply. *Murphy v. Christian Press Ass'n*, 38 App. Div. 426, 56 N. Y. Supp. 597. But one who makes or vends an article which is made by a secret process or private formula cannot appeal to the protection of any statute creating a monopoly in his product. He has no special property in either a trade secret or a private formula. The process or the formula is valuable only so long as he keeps it secret. The public is free to discover it if it can by fair and honest means, and, when discovered, anyone has the right to use it. *Chadwick v. Covell*, 151 Mass. 190, 23 N. E. 1068, 6 L. R. A. 839, 21 Am. St. Rep. 442; *Tabor v. Hoffman*, 118 N. Y. 30, 23 N. E. 12, 16 Am. St. Rep. 740; *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664; *Vulcan Detinning Co. v. American Contracting Co.*, 58 Atl. 290, 67 N. J. Eq. 243. In *Chadwick v. Covell*, Justice Holmes, speaking of the character of the title one has to a secret formula, said:

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"Dr. Spencer had no exclusive right to the use of his formulas. His only right was to prevent anyone from obtaining or using them through a breach of trust or contract. Any one who came honestly to the knowledge of them could use them, without Dr. Spencer's permission and against his will. *Peabody v. Norfolk*, 98 Mass. 452, 458, 96 Am. Dec. 664; *Morison v. Moat*, 9 Hare, 241, 263; *Williams v. Williams*, 3 Meriv. 157. The defendant got his knowledge honestly, and therefore has a right to make and sell the medicines. Having the right to make and sell the medicines, the defendant has the right to signify to the public that the medicines are made according to the formulas used by Dr. Spencer."

In *Tabor v. Hoffman*, cited above, the New York court said:

"If a valuable medicine, not protected by patent, is put upon the market, any one may, if he can by a chemical analysis and a series of experiments, or by any other use of the medicine itself aided by his own resources only, discover the ingredients and their proportions. If he thus finds out the secret of the proprietor, he may use it to any extent that he desires without danger of interference by the courts."

But in the case of a patent the monopoly endures for the whole term of the patent. It gives the patentee the right to control the use of his invention during the entire period, and he may rightfully protect by contract his power to regulate all manufacture, sale, or use of things embodying his invention. It is this continuity of the right granted to the patentee which distinguishes it from the right to manufacture, sell, or use unpatented articles. If a man shall make a new invention or make a new discovery and it is useful, he may obtain a patent and thus secure a reward. But even then he must pursue the prescribed course in order to obtain it. He may keep his secret if he can. But, if he puts upon the market things embodying it, he forever loses his right to acquire a monopoly in it; i. e., to obtain a patent, either for manufacture, sale, or use. But it does not follow that because the owner of a secret formula cannot protect himself against discovery of his secret by fair means that he cannot protect himself against a betrayal of his secret by one who has received it through [30] confidential relations. *Jarvis v. Knapp*, 121 Fed. 34, 58 C. C. A. 1; *Harrison v. Glucose Co.*, 116 Fed. 304, 311, 53 C. C. A. 484, 58 L. R. A. 915;

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*Tabor v. Hoffman*, 118 N. Y. 30, 23 N. E. 12, 16 Am. St. Rep. 740; *Morison v. Moat*, 9 Hare, 241; *Chadwick v. Covell*, 151 Mass. 190, 23 N. E. 1068, 6 L. R. A. 839, 21 Am. St. Rep. 442. So also will the owner of a secret process or formula be protected against a breach of contract, when the secret is communicated in confidence and under restrictions as to its use. *Fowle v. Park*, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67.

In *Fowle v. Park*, the owner of the formula sold the right to make the remedy and sell it under its trade-name at a restricted price within a given territory. The court enjoined the breach of this agreement. The conclusion of the learned Chief Justice who wrote the opinion of the court seems to rest, not upon any notion that contracts touching the sale of a secret formula or trade secret were outside the rules of the common law in regard to restraints of trade, but rather upon the theory that such contracts were governed by the principle against restraints, but valid because the covenants were made in connection with the sale of a business and not larger than necessary to protect the reserved rights of the assignor to carry on the same business. In *Central Transportation Co. v. Pullman Palace Car Co.*, 139 U. S. 24, 53, 11 Sup. Ct. 478, 35 L. Ed. 55, Justice Gray seems to have rested the legality of such covenants upon the peculiar nature of the property which is the subject of the sale, saying:

"Upon the sale of a secret process, a covenant, express or implied, that the seller will not use the process himself or communicate it to any other person, is lawful, because the process must be kept secret in order to be of any value, and the public has no interest in the question by whom it is sold."

The most satisfactory ground upon which covenants restraining the use to be made of a trade secret may be said to not contravene the common-law rules against monopoly and restraints lies in the peculiar character of the property right which is concerned. So long as the owner of such a secret can preserve its secrecy he has necessarily a monopoly in its use, and there is no illegal restraint because he refuses to make it public. Neither is the public interest affected when a secret process or formula is used by A. or B. or by both. There is no restraint of trade in respect of a method which is known only to the discoverer and those to



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whom he chooses to communicate it under restrictions. Having no right to compel a publication, the public lose no right by respecting a restricted disclosure, for no freedom of traffic has been stifled. The language of Justice Holmes in *Board of Trade v. Christie*, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031, in respect of contracts limiting the right of those who receive the market quotations to a special use, is equally applicable to trade secrets in general. The learned justice said:

"But, so far as these contracts limit the communication of what the plaintiff might have refrained from communicating to any one, there is no monopoly or attempt at monopoly and no contract in restraint of trade, either under the statutes or at common law."

In *Ammunition Co. v. Nordenfeldt*, L. R. 1 Ch. Div. 630, 1894, Lord Justice Bowen said that the sale of a trade secret was not with[31] in the mischief of restraint of trade, because, "unless such a bargain was treated as outside the doctrine of general restraint of trade, there could be no sale of secret processes of manufacture."

The basis of the common-law protection accorded to an author is the same. His legal rights grow out of the peculiar nature of the property. His composition is properly regarded as his absolute property. He need not disclose it. But the unrestricted offer of a single copy to the public operates as a disclosure or publication, and his exclusive right to make other copies is gone. But he may in confidence exhibit his work under restrictions, and this, like the confidential disclosure of a trade secret, will not amount to a dedication to the public, and he will be protected against a violation of the conditions imposed. The whole subject of the common-law rights of an author is so fully and carefully discussed by Judge Townsend in *Werckmeister v. American Lithographic Co.*, 134 Fed. 321, 69 C. C. A. 553, 68 L. R. A. 591, and in *Bobbs-Merrill Co. v. Straus* (C. C. A.) 147 Fed. 15, that it would be a work of supererogation to again go over the subject. The cases relating to the distribution of news and information rest also upon the peculiar kind of property rights involved. So long as one who by his own industry has gathered together news or information, and does not disclose it, he cannot be compelled to make publication.

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The matter is his own in as true a sense as a trade secret or private formula, or the composition of an author. In such circumstances it is not illegal to protect the news gatherer against the piratical use of his news and prevent a public disclosure by one who has placed himself under obligation to respect a restricted use. In such case public disclosure is destructive of its value as property. *Board of Trade v. Christie*, 198 U. S. 236, 250, 25 Sup. Ct. 637, 49 L. Ed. 1031; *Jewelers' Mercantile Agy. v. Jewelers' Pub. Co.*, 84 Hun, 12, 32 N. Y. Supp. 41; *Id.*, 155 N. Y. 251, 49 N. E. 872, 41 L. R. A. 846, 63 Am. St. Rep. 666; *National Tel. News Co. v. Western Union Tel. Co.*, 119 Fed. 294, 56 C. C. A. 198; *Exchange Tel. Co. v. Gregory, etc., Co.*, 1 Q. B. Div. 147 (1896); *F. W. Dodge, etc., Co. v. Construction Co.*, 183 Mass. 62, 66 N. E. 204, 60 L. R. A. 810, 97 Am. St. Rep. 412. In the *Board of Trade Case*, cited above, Justice Holmes, speaking of the protection granted to the business of distributing stock quotations, said:

"In the first place, apart from special objections, the plaintiff's collection of quotations is entitled to the protection of the law. It stands like a trade secret. The plaintiff has the right to keep the work which it has done, or paid for doing it, to itself. \* \* \* The plaintiff does not lose its rights by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public."

The trading stamp and railroad ticket cases, such as *Sperry & Hutchinson Co. v. Mechanics' Clothing Co.* (C. C.) 135 Fed. 833, and *Nashville, etc., Ry. Co. v. McConnell* (C. C.) 82 Fed. 65, likewise rest upon the peculiar character of the property rights involved. Neither concern the buying and selling of articles of general commerce, and both relate to things in the nature of contracts personal in character, and not to things which can ever become the subject of general trade and traffic. But it does not follow that because a secret process [32] or formula for a medicine or beverage will be protected against betrayal by employes or those to whom it has been communicated in confidence under a contract for a restricted use that a system of contracts for the control of all sales and sub-sales of the device, medicine, or beverage

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when once made will be outside of the rules in restraint of trade simply because the product of such secret process or formula. We have here to deal not with contracts which relate to the secret formula itself, or the right to use a trade-name or dress, as in *Fowle v. Park*, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67, but with the preparation when made by the owners of the process. The preparation when ready for the market and the formula are two separate and distinct things and may have distinct ownerships. Contracts in respect of a restricted use of the formula are not within the rule against restraint because of the character of the property right in such a secret. There can be no unrestricted use, before discovery by fair means, to which the owner does not consent, and then only at the expense of the destruction of its commercial value as a secret; but this is not the case with contracts which affect only traffic in the manufactured product of the secret formula. Freedom of traffic in that is consistent with its value and does not involve exposure of the formula.

Neither is there any such analogy between an article made under a patent and an article made under a secret formula as to require like exemptions from the rules which relate to articles made under neither. It is well at this point to notice that the exemption from the rule against restraint has never been extended to contracts in respect of articles made under a patent which have once passed beyond the domain of the patent by an original sale without restriction. The only reason which has ever been given for holding that a contract restricting the field of using, selling, or making of an article made under a patent is that the patent statute has granted an exclusive monopoly which cannot be cut down by the rule against restraint for that would be to grant a monopoly by law and then proceed to take it away by law.

But, if the owner of a secret process or a private formula does not or cannot bring himself under the protection of the patent statute by securing a patent upon his discovery, he cannot claim the advantage of the statute. The patent law, in consideration of a full and complete publication of the discovery or invention of the patentee, has granted to him a monopoly of his invention, including the making, selling,

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and using of devices embodying it, for a limited term of years. At the end of that time the disclosure made at the time he applied for his patent will enable the public to enjoy his discovery, and thus find compensation for the exclusive right temporarily conceded to the inventor. No statute grants any such monopoly to anyone who does not elect to avail himself of the benefits of the patent or copyright law. A trade secret or medical formula protects its owner only against those who acquire it under a confidential obligation to guard against disclosure, and, as we have already seen, one is free not only to use the process or formula if discovered by skill and investigation without breach of trust, but to make and sell the thing or preparation as made [33] by the process or formula of the original discoverer, if that be the truth. *Chadwick v. Covell*, 151 Mass. 190, 23 N. E. 1068, 6 L. R. A. 839, 21 Am. St. Rep. 442. To say that the owner of this secret need not make the medicine, nor sell it when made, unless it suits his convenience, is true. But the same thing may be said of the man who grows potatoes. He need not grow them, and need not sell them when grown. But, if something be conceded in favor of an article which no one can produce except the owner of the formula over one which any one can produce, what shall it be? There is no statute creating a lawful monopoly such as seems to take articles made thereunder without the rule against illegal restraint. Neither will the commercial value of the manufactured product vanish if subjected to the principles which apply to things not so made. None of the reasons which apply to patented articles, copyrighted productions, or to restricted disclosure of the secret formula itself apply to the product of the formula.

Without assenting to the claim that the making and selling of the preparation is a "publication" in the technical sense of that term, we are nevertheless unable to discover any legal or economic reason which justly exempts such articles when made from all of the rules of the common law which forbid unreasonable restraints in trade and from the Anti-Trust Act of Congress in so far as trade in the prepared medicine is the subject of interstate commerce. Judge

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Cochran, who heard this case below, after considering the differences between a secret process and the article made, said:

"What is there, then, in the nature of the articles made under a secret process to occasion any difference between them and articles not so made or between them and articles which one may not have made at all, but simply owns, in the matter of the validity of restraining contracts entered into by the purchasers thereof from the owner? It is hard to conceive of any. It is true that the manufacturer and owner of the articles made under the secret process may refrain from making them and selling them to purchasers and thus putting them on the market. Equally so the manufacturer and owner of any other articles may refrain from so doing. So, also, the owner of articles that he has not made, but purchased or obtained otherwise from the manufacturer, may refrain from selling them to purchasers and thus putting them on the market. Suppose the owner of a patent should sell all the articles made under it to another with license to use or resell them, thus passing them outside of the monopoly of the patent hands of the purchaser, would the mere fact that they had been made under the patent lend any sanctioning force to a restraining contract entered into in reference thereto by a subpurchaser thereof? I must conclude, therefore, that the fact that the complainant's medicine has been made under a secret process has no effect whatever upon the validity of the system of contracts involved herein. He has no greater rights in relation thereto, as distinguished from the secret process under which it was made, than the owner of any other tangible personal property, whether made by him or not, would have in relation to such property."

Although Judge Cochran concluded that the complainant's preparations were no more exempt from the common-law rules against restraints of trade by reason of the fact that they had been prepared under secret formulas than if that had not been the case, he reached the ultimate conclusion that any vendor of an article might make similar contracts to those in suit, and that the control which was thereby secured over subsequent sales was not an unreasonable restraint [34] of trade. Most of the cases which he cites in support of his conclusion are in conflict with the grounds upon which he rests his decision, and, indeed, the learned counsel for the Hartman Company have not assented to so much of Judge Cochran's opinion as holds that a trade secret remedy stands in no better plight than it would if the preparation had been disclosed upon the label. And so it has come

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about that the cases which have directly involved the Hartman system of contracts, and which are relied upon by counsel to sustain their legality, all stand upon the assumption that an article made under a secret formula may be the subject of contracts maintaining prices and controlling subsequent sales to as full an extent as an article made under a patent or a production secured by a copyright. The cases directly in point are all nisi prius decisions, except *Jayne v. Loder*, 149 Fed. 21, decided by the Circuit Court of Appeals, Third Circuit, and are all quite recent. They include three cases in which the *Dr. Miles Medical Company* was the plaintiff, namely, *Dr. Miles Medical Company v. Goldthwaite* (C. C.) 133 Fed. 794. The force of this case is weakened because the decree was not resisted. The next is *Dr. Miles Medical Co. v. Jaynes Drug Co.*, 149 Fed. 838, decided by the same judge who decided the *Goldthwaite Case*. The next is *Dr. Miles Medical Co. v. Platt* (C. C.) 142 Fed. 606. This was followed by *Wells & Richardson v. Abraham* (C. C.) 146 Fed. 190, in which the legality of the contracts was not denied, thus lessening the value of the opinion as an authority. The ground upon which the two contested cases cited above was rested was the identity between the rights of a patentee and the owner of a mere trade secret or private formula with respect to the product or manufactured article. Thus, in *Dr. Miles Medical Co. v. Jaynes*, cited above, Judge Colt said:

"The contention of the defendants is that these contracts are unlawful because they are in restraint of trade. In support of this they do not rely so much upon the common-law rule as upon the federal statute (26 Stat. 209). The bill alleges that the complainant is the exclusive owner of these secret formulas, and the exclusive manufacturer of these remedies. It follows that, until voluntary disclosure or lawful discovery, the complainant has an exclusive property in these trade secrets and has the exclusive right to make and use and vend the articles made thereunder. The exclusive right or property in a trade secret is of necessity a monopoly, the same as a patent or a copyright. The complainant may make these articles, or refrain from making them. It may sell them, or refrain from selling them. It may sell them to one person, and not to another, and at such prices and upon such conditions as it may deem most advantageous. Contracts like those set out in the bill concerning articles made under trade secrets, the same as similar contracts concerning

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articles made under a patent or copyright, are outside the rule of restraint of trade whether at common law or under the federal statute. *Hartman v. Park* (C. C.) 145 Fed. 358; *Dr. Miles Medical Co. v. Platt* (C. C.) 142 Fed. 606; *Wells & Richardson Co. v. Abraham* (C. C.) 146 Fed. 190; *Dr. Miles Medical Co. v. Goldthwaite* (C. C.) 133 Fed. 794; *Bement v. National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1068; *Board of Trade v. Christie*, 198 U. S. 236, 252, 25 Sup. Ct. 637, 49 L. Ed. 1031; *Garst v. Harris*, 177 Mass. 72, 74, 58 N. E. 174; *Fowle v. Park*, 131 U. S. 88, 97, 9 Sup. Ct. 658, 33 L. Ed. 67; *Park & Sons Co. v. National Wholesale Druggists' Association*, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578; *Standard Fireproofing Company v. St. Louis Company*, 177 Mo. 559, 76 S. W. 1008; *Victor Company v. The Fair*, 123 Fed. 424, 61 C. C. A. 58; *Heaton-Peninsula Company v. Eureka Company* (C. C.) 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728; [85] *Central Shade Company v. Cushman*, 143 Mass. 353, 9 N. E. 629; *Good v. Daland*, 121 N. Y. 1, 24 N. E. 15."

In *Dr. Miles Medical Co. v. Platt* (C. C.) 142 Fed. 606, 610, Judge Kohlsaat says:

"These suits are brought for an infringement or violation of the property right of the complainants in the secret process owned or controlled by them. The right of a patentee, owner of a copyright, or owner of a secret process is merely the right of exclusion or debarment. The holder of such a property right, as said by the court in the *Victor Talking Machine Case*, cited above, is a czar in his own domain. He may sell or not, as he chooses. He may fix such prices as he pleases. He may sell at one price to one person, and another to another person. He is not required to give reasons or deal fairly with purchasers. Why is it material, then, in a suit to prevent infringement of complainants' rights in their secret processes, to inquire whether complainants have entered into a combination or conspiracy to control the very thing they are lawfully entitled to control?"

*Jayne v. Loder*, cited above, was cited by the Third Circuit Court of Appeals. It was an action under the seventh section of the Anti-Trust act against a combination of three distinct national associations, one that of the wholesale druggists, another that of the retail druggists, and the Association of Manufacturers of Proprietary Medicines. The object of the combination was to exclude every dealer from trading in proprietary medicines at all who would not consent to sell to members of the combine only and at prices named by it. Arguendo Judge Archbald did say that an individual proprietor might enforce his own terms in respect to his own goods. But this was not involved. The combination was in

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the teeth of the law whether an individual proprietor could or could not enforce such a system as that there involved.

If we are right in our conclusion that the manufactured product of a trade secret or private formula is not immune from the common-law rules forbidding monopolies and unreasonable restraints in trade, the cases above referred to must be disapproved, at least in so far as they are grounded upon the cases which deal with articles made under patents or copyrights. In addition to the cases cited above, counsel for the appellees cite and rely upon *Park v. National Wholesale Druggists' Ass'n*, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578. That case involved the validity of a method of doing business and a system of contracts between manufacturers of proprietary medicines and wholesale druggists dealing in such medicines for the purpose of suppressing competition in prices. The opinion does not support the validity of such a system of contracts with reference to medicines not protected by any patent, for the decision is bottomed upon the assumption that the "proprietary medicines," the subject of the contracts then involved, were made under patents. Judge Haight, who delivered the opinion of the court, said:

"The matter in controversy has reference to the sale by manufacturers of those particular medicines or remedies covered by trademarks, copyrights, or patents which secure to the manufacturer or proprietor the exclusive right to manufacture and sell the same. These medicines are known as 'proprietary goods,' and their manufacture and sale are confessedly under the control and management of the owner or manufacturer, who may fix his own price and adopt such plan for the sale thereof as he, in his judgment, may determine."

[36] To the objection that the contracts were in restraint of trade, he said:

"Nor does the plan appear to me to be in restraint of trade. It is true that it does away with the competition among dealers as to prices, but it creates no restriction upon them as to the quantities that they may be able to sell or the territory within which they may confine their transactions; but upon the question of prices we must bear in mind that the goods are covered by patent rights and trademarks, which give the proprietors the exclusive right of specifying prices at which the articles shall be sold, and, following this, the right also to require dealers to maintain the prices specified."



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The principle upon which *Park & Sons Co. v. National Wholesale Druggists' Association* was decided is emphasized in the subsequent case of *Straus v. American Publishers' Assn.*, 177 N. Y. 473, 477, 69 N. E. 1107, 64 L. R. A. 701, 101 Am. St. Rep. 819, where was involved the validity of an agreement between publishers of copyrighted books to regulate the price at which retail dealers should sell such books. If the agreement had stopped there, the New York court thought the agreement valid and not in unlawful restraint of trade under the principles announced in *Bement v. National Harrow Company*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, an opinion to which we have heretofore referred, which involved contracts for controlling prices of articles made under patents. After referring to the *Bement Case* Judge Parker, who had written a concurring opinion in the previous case, after setting out the reasoning of Justice Peckham in the *Bement Case*, said:

"That reasoning is employed as to patent rights. It is equally applicable to copyrights, the protection of which was perhaps the leading object of the association and agreement attacked in this action. And it points to the principle underlying the decision in the *Park & Sons Co. Case*, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578, upon which defendants apparently rest their claim that the judgment of the Appellate Division should be reversed. But there is a feature in this case not to be found in that one, and which requires a different judgment than the one rendered therein, which will now be pointed out."

The dissenting opinion of Judge Martin, in case of *Park & Sons Company*, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578, also proceeds upon the assumption that the subject-matter of the agreement concerned medicines made under patents. See page 42 of 175 N. Y., on page 140, of 67 N. E. (62 L. R. A. 632, 96 Am. St. Rep. 578). The vice which the New York court found in the *Straus Case* was, not that the agreement obliged publishers not to sell copyrighted books to dealers who would not maintain the retail price dictated by the publishers, but that they also refused to sell uncopyrighted books to all such dealers as did not maintain prices on copyrighted books. This the court found under the facts of the case would operate practically

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to exclude all persons from the business of selling uncopyrighted books who would not become parties to the agreement to maintain the price of copyrighted books, and tended to create a monopoly of sale of books not copyrighted. Touching this, the court said:

"While the leading object of this association and agreement purports to be to secure to the owner and publisher of copyrighted books that protection which the Federal government permits them to enjoy for the reasons stated by Chief Justice Marshall (*supra*), it does not stop there. It also affects the right of a dealer to sell books not copyrighted at the price he chooses, or to sell at all if he fails to comply with the rules of the association. A combination creating a monopoly of the sale of books not protected by copyright offends against the law of this state as much as if it related to bluestone [*Union Bluestone Co. Case*, 164 N. Y. 401, 58 N. E. 525, 52 L. R. A. 262, 79 Am. St. Rep. 655] or envelopes [*Berlin & Jones Envelope Co. Case*, 166 N. Y., 292, 59 N. E. 906], and according to this complaint, which must be accepted as true on this review, such an outcome is not only possible but probable. But it is not of moment whether such a result is probable or not; for the test to be applied is: What may be done under the agreement? Reference to the complaint makes it clear that the association has undertaken to provide for the practical exclusion from the business of selling books not protected by copyright all who refuse to be bound by the rules of the association."

That decision puts the New York court squarely in opposition to agreements, combinations, and "systems of contracts" between a manufacturer of unpatented or uncopyrighted articles and his vendees which tend to an unreasonable restraint of trade or to create a monopoly, and makes plain the ground upon which such contracts had been maintained in the *Park & Sons Co. Case*. That the "proprietary medicines," called more than once "patent medicines," were not in fact patented, is of no significance, if true, for the court assumed they were, and it does not appear from anything in any of the opinions that the fact assumed was not true. That opinion, by its own language, as well as by the pointed reference to the principle upon which it rested in the later opinion of the same court, has no application when, as here, the subject of the contracts in question is unpatented and uncopyrighted articles. The cases of *Elliman & Sons v. Currington & Son*, L. R. 1901, 2 Ch. Div. 275, and *Garst v.*

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*Harris*, 177 Mass. 72, 58 N. E. 174, are also cited as supporting the legality of such a series of agreements as that under which complainant conducts his business. Both cases involved contracts of sale of article, presumably made under secret formulas, though no stress is laid upon the fact in the *Elliman Case*. Each was a suit directly between the vendor and his vendee. Each involved only a single transaction by which the article was sold upon an agreement that the purchaser would not resell at less than a named price. Neither concerned any other rights than those of the contracting parties, and neither decides more than that an agreement of sale of a chattel by which the purchaser agrees that he will not sell below a certain price is valid and not such a restraint of trade as to be obnoxious to the law. Neither case holds that a buyer from such a vendee, even with notice, would not get title or come under the obligation of the contract between the original parties. The most that can be made of the decisions is that, having regard to the subject-matter and the limited character of each agreement, neither contract had that sweep and extent which would constitute the restraint an unreasonable one, and therefore not within the mischief of the rule against restraints. The *Elliman Case* was decided by a single judge.

*Walsh v. Dwight* (Sup.) 58 N. Y. Supp. 91, another case relied upon to support the decree, was an action by a maker and dealer in saleratus and soda, alleged to be an article in common use, against another maker who sold another brand which he called "Dwight's [38] Cow Brand Saleratus and Soda," for damages to him through a course of business by which his brand of the same article lost much demand. The defendant did this, first, by extensive advertising; second, by giving to all dealers a rebate who would agree to sell its article at a minimum price named and to charge a like price for every other brand. The price thus fixed was, as averred, an extravagant price and operated to enlarge the demand for the defendant's advertised brand and diminish that for the plaintiff's. The court found no illegal restraint of trade, as there was "nothing to prevent others from engaging in the business or the manufacturers of other articles from selling

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their products to anyone willing to buy." The substance of the decision is well stated in the syllabus as follows:

"An agreement by a manufacturer with his customers to give them a rebate if they should refuse to sell his article, or other similar articles, at less than a certain price, is not in restraint of trade."

The fact that "Peruna" is a trade-name, that it is put on the market in a distinctive trade dress, has no bearing upon the question. The defendants are not charged with infringing the trade-mark or trade dress. The medicine they bought was the medicine put up by the complainant, and the defendants have neither sold nor offered to sell a preparation of their own for and as the preparation of the complainant. A trade-mark, or a trade-name, or trade dress, have no other effect than to prevent one from "palming" off his goods for those of another. *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118. The averments of the bill as to the complainant's trade-name and trade dress are irrelevant, for no exemption from the principles of the common law is secured by either. *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118. The transactions described in the bill plainly constitute sales of complainant's medicines and the general title passes to every such purchaser and subpurchaser. *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 590, 61 N. E. 219, 55 L. R. A. 631. To call such a purchaser an "agent" is to juggle with words. "Sale" is a word of precise legal import, and every wholesaler who orders goods under one of complainant's uniform contracts becomes a buyer, obtains the title, and may convey the title to another. The case must therefore turn upon the legality of the restrictions imposed by the complainant in sales which pass the general property in chattels, as well as the possession, and provide for no reverter.

Neither is the suit based upon any breach of contract by the defendants. Confessedly, they have made no contract with complainants, and have definitely refused to conform to complainant's methods of doing business. That they have

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bought "Peruna" on the market from sellers who had it for sale is true. That the bill avers that they bought without being licensed to buy is true. That they bought from vendors who knew this fact and who thereby breached their agreement not to sell to dealers who had not been certified to them as licensed buyers who had entered into an agreement with the complainant restricting re-sales is also averred. That Park & Sons Company knew [39] complainant's plan of business, and that in selling to them every such vendor thereby breached his agreement, is also charged, and, for the purpose of the demurrer, admitted. What is the result? Did the defendants by so purchasing, with knowledge of the restrictions imposed upon sales, thereby enter into contractual relations with complainant? Manifestly not. Did they obtain the absolute title, notwithstanding their knowledge that the sale was in breach of restrictions imposed upon the seller? Undoubtedly. The restrictions imposed by complainant upon sales and re-sales, if valid at all, are only so because they constitute personal contracts upon which an action will lie only against the contracting party. *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631. A prime objection to the enforceability of such a system of restraint upon sales and prices is that they offend against the ordinary and usual freedom of traffic in chattels or articles which pass by mere delivery.

The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void. "If a man," says Lord Coke, in Coke on Littleton, § 360, "be possessed of a horse or any other chattel real or personal, and give his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him so as he hath no possibility of reverter; and it is against trade and

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traffic and bargaining and contracting between man and man." It is also a general rule of the common law that a contract restricting the use or controlling sub-sales cannot be annexed to a chattel so as to follow the article and obligate the sub-purchaser by operation of notice. A covenant which may be valid and run with land will not run with or attach itself to a mere chattel. *Spencer's Case*, 3 Resolution, 5 Coke, 16; *Wald's Pollock on Contracts* (3d Ed.) 278; *Splidt v. Bowles*, 10 East, 279, 282; *Smith v. Williams*, 117 Ga. 782, 45 S. E. 394, 97 Am. St. Rep. 220; *Prater v. Campbell*, 110 Ky. 23, 60 S. W. 918; *Appollinaris Co. v. Scherer* (C. C.) 27 Fed. 18, 21; *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 691, 61 N. E. 219, 55 L. R. A. 631; *Taddy Co. v. Sterions Co.*, 73 Law Journal, 1904, Ch. Div. p. 191; *De Mattox v. Gibson*, 4 De J. & Jones, 276, 282. Against this conclusion, and in supposed opposition to the above authorities, counsel for the appellee have cited the line of cases heretofore referred to relating to contracts restraining the use or sale of articles made under patents or copyrights. We have already indicated herein that these cases do not apply to contracts which do not relate to articles not made under patents or copyrights. They also cite *New York Bank Note Co. v. Hamilton Bank Note Co.*, 180 N. Y. 280, 294-295, 73 N. E. 48, *De Mattox v. Gibson*, 4 De J. & Jones, 276, and *Whitwell v. Tobacco Co.*, 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689. *The New York Bank Note Company Case* concerned the legality of a contract for the sale of "Kidder [40] Printing Presses" with attachments enabling them to do a certain class of work. There were patents upon certain parts of the press, but none upon the attachments. It was contended that a covenant which restricted the sales of the press with the attachments was void as in restraint of trade. The fourth syllabus is in these words:

"The fact that the contract restricted the sale of presses except to the printing company, and that a separate consideration was paid for the covenant of restriction, does not render the contract so unreasonable in its restraint of trade that it is void for that reason, where the adoption of the press to the special use was the work of both parties and the covenant not to sell other presses for similar work accompanied the manufacture and sale of a press, and constituted an integral part of the thing sold."

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The ground is better shown by the following extract from the opinion itself:

"So far as the machine was the subject of patent its use was lawfully a monopoly, and therefore no contract relating to it could be condemned as creating a monopoly. But, whatever may have been the case as to the patentable character of the machine, we think the fact that its adaption to the special use was the joint work of both parties, and that the covenant not to sell other presses for similar work accompanied the manufacture and sale of a machine, rendered that covenant reasonable as constituting an integral part of the value of the thing sold."

See *Tode v. Gross*, 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 652, 24 Am. St. Rep. 475. It is manifest that the case is not in point. *De Mattox v. Gibson* is still less an authority.

Under a bill for specific performance of a charter party the question arose as to whether a mortgagee of the chartered vessel should be allowed to foreclose and thereby intercept a voyage which the vessel was under contract to make when the mortgage was given, of which contract the mortgagee had notice. It was in respect of such facts that Justice Bruce used the language which is supposed to support the notion that a covenant may attach to chattels which pass by delivery from hand to hand and bring any one who buys with notice under the restrictions against a re-sale at less than a dictated price. But even in that case it was said that the mortgagee who took his mortgage with notice incurred no liability in respect to the charter party, and was only obliged to desist from doing anything which would prevent performance. *Whitwell v. Tobacco Co.* involved nothing more than whether a tobacco manufacturer might sell his goods at one price to those who would agree to buy only from him and at a higher price to those who would not.

The conclusion we reach upon all the foregoing considerations is that the complainant cannot obtain the active interposition of a court of equity against one who is under no contract relation to him, unless the covenants which he has imposed upon his vendee and subvendees are only such reasonable and partial restraints, for his own protection, as may be legally exacted by one who sells a business or property. This court in *United States v. Addyston Pipe Co. et al.*, 85

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Fed. 271, 281, 29 C. C. A. 141, 46 L. R. A. 122 et seq., speaking by Judge Taft, laid down as an indispensable condition that "no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party." Covenants in partial restraint, and ancillary to a principal contract, which had generally been upheld, the learned judge divided into five principal classes. The fourth of these classes he defined as covenants "by the buyer of property not to use the same in competition with the business retained by the seller." As typical cases under this class, he cited *American Strawboard Co. v. Haldeman Paper Co.*, 83 Fed. 619, 27 C. C. A. 634, and *Hitchcock v. Anthony*, 83 Fed. 779, 28 C. C. A. 80, both being decisions by this court. *Navigation Co. v. Winsor*, 20 Wall. (U. S.) 64, 22 L. Ed. 315; *Dunlop v. Gregory*, 10 N. Y. 241, 61 Am. Dec. 746; *Hodge v. Sloan*, 107 N. Y. 244, 17 N. E. 335, 1 Am. St. Rep. 816. The court below located the contracts here involved as coming under the fourth class, being covenants ancillary to the sale of the medicines put up by the complainant, which he concluded were not unreasonable for the protection of the retained business of the covenantee. Assuming that these contracts operate only as a partial and not a general restraint, a question which we do not concede, and that they are properly to be considered as covenants ancillary to a principal contract, are the restraints thereby imposed necessary to protect the complainant in his retained business, or to protect him from an unjust use of the articles by the purchaser? In the first place, we are to consider that we are not here dealing with a single contract. The complainant has made a multitude of them in identical terms, and the opposite parties comprehend, according to his bill, a large majority of the wholesale and retail druggists in the United States. The reasons which might uphold covenants restricting the liberty of a single buyer might prove quite inadequate when there are a multitude of identical agreements. The single covenant might in no way affect the public interest, when a large number might. So, also, the question



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as to whether the restraint was necessary to the retained business, and therefore ancillary to the principal purpose of the agreement, or whether the restraining covenants were not the principal rather than the ancillary matter, would largely depend upon the general sweep and result of a multiplication of identical contracts. The general purpose of each separate contract is the regulation of the prices and sales of the line of preparations made by complainant. A common purpose unites each covenantee to every other and the "system" is to be construed as "one piece," in which the complainant and every assenting dealer, whether wholesaler or retailer, is a party, and the agreement of each such covenantee to sell only at the prices dictated by the manufacturer constitutes one general scheme. The question here is therefore one of a totally different character from that which would arise if the question was the more simple one presented by a breach by a single covenantee. In *Continental Wall Paper Co. v. Voight & Sons Co.* (C. C. A.) 148 Fed. 939, where was involved a combination in restraint of trade, and, where each wholesaler and retailer in the business had executed separate but identical contracts with the corporation representing the combined manufacturers, we held that each such separate covenantee was a party to the general scheme for enhancing [42] prices. This was rested upon the holding that the several agreements constituted one whole. See, also, observations of Judge Taft in *United States v. Addyston Pipe Co.*, 85 Fed. 275, 29 C. C. A. 141, 46 L. R. A. 122, and of Justice Peckham in *Montague v. Lowry*, 193 U. S. 38, 45, 46, 24 Sup. Ct. 307, 48 L. Ed. 608.

The plain effect of the "system of contracts," the purposed relation of each to every other being confessed by the very description of the method of carrying on business stated in the bill, is, first, to destroy all competition between jobbers or wholesale dealers in selling complainant's preparations. Complainant restrains himself by agreeing to sell at only one price and to only such persons as will sign one of his system of contracts. The contracting wholesalers or jobbers covenant that they will sell to no one who does not come with complainant's license to buy, and that they will not sell below a minimum price dictated by complainant. Next, all

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competition between retailers is destroyed, for each such retailer can obtain his supply only by signing one of the uniform contracts prepared for retailers, whereby he covenants not to sell to any one who proposes to sell again unless the buyer is authorized in writing by the complainant, and not to sell at less than a standard price named in the agreement. Thus all room for competition between retailers, who supply the public, is made impossible. If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the product marketed by complainant, it is not discoverable. Thus a combination between the manufacturer, the wholesalers, and the retailers to maintain prices and stifle competition has been brought about. It is true that the complainant is not in a combination with other makers of "Peruna." There are no others. If there were, there would not be a complete or general restraint; for it might then happen that these others, not being bound by any covenants, could supply the public. If the supply to come from them was adequate for the public demand, the public might be in no wise affected. Now, if the complainant had absorbed all the sources from which the demand for lumber, or furniture, or stoves could be supplied and then should say, "I will sell only to those who will re-sell only to those I shall license to buy and only at the price I dictate," could any voice be raised to say that the covenants, which every dealer should sign in order to prevent exclusion from trade in such articles, would be upheld by the courts and a remedy by injunction granted to restrain breaches? But it is said that a distinction exists between contracts which relate to articles which any one can make and sell and those which are made under a secret process, and that covenants in respect to the former might affect the public interest, while the public would not be affected by like covenants relating to the latter class of subjects. But, unless we are willing to say that that fact places such products wholly outside of the mischief incident to restraints of trade and upon a plane of equality in that respect with that occupied by things made under the statutory monopoly of a patent, the fact can be of no weight except as it may be a factor in determining whether the covenants exacted of jobbers and retailers, alike regu-

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lating subsequent sales and selecting subsequent buyers, are [43] no more than necessary to afford a fair protection to the business of the complainant and not so large as to interfere with the interests of the public. There can be no hard and fast rule by which the result can be reached in such cases. At last the question must come to this: "What is a reasonable restraint with reference to a particular case?" This was the test applied in *Horner v. Graves*, 7 Bing. 735, and in *Nordenfeldt v. Maxim Nordenfeldt Co.*, 1894, App. Cases, 535, 567, and also approved by this court in the *Addyston Pipe Co. Case*, 85 Fed. 271, 282, 29 C. C. A. 141, 46 L. R. A. 122. A general system of contracts, such as that which the complainant seeks to enforce and which the bill avers is a method generally adopted in his line of business, involves very different questions from those which arise when a single contract only is involved and when the action is between the contracting parties for a breach, as was the case in *Garst v. Harris*, 177 Mass. 72, 58 N. E. 174, and *Elliman v. Carrington*, L. R. 1901, 2 Ch. Div. 275.

Now, in what way is only a fair protection afforded the interests of complainant by stifling all competition between the jobbers of the United States who deal in complainant's preparations? In what way are the covenants which forbid them to resell to any one who will buy "necessary," to use Judge Taft's phrase, "to protect the covenantee in the enjoyment of the legitimate fruits of the contract or to protect him from the dangers of an unjust use of those fruits by the other party"? In what way are covenants which compel retailers to maintain prices, to quote Chief Justice Tindal, "such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public"? *Horner v. Graves*, 7 Bing. 735. The learned trial judge found it difficult to answer these questions. He says in his opinion (145 Fed. 358):

"That complainant's vendees and sub-vendees should be so restrained is advantageous to complainant's business. It would be an injury to it for them not to be so restrained. Exactly how it is so advantaged and how it would be injured by a removal of the restraint

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has not been developed in the argument; and I do not feel sufficiently advised of such matters to say as to this. It would seem that the existence of such a system of contracts in relation to complainant's medicine would tend to prevent demoralization in the trade therein through competition amongst its vendees and sub-vendees and enable him to maintain his prices for his medicine."

The averments of the bill are very general. Thus it is averred that:

"Some time since the class of stores known as 'department stores' and 'cut rate stores' have inaugurated a system of obtaining from cut rate wholesale and jobbing druggists and elsewhere, and offering for sale your orator's medicines, remedies, and preparations at retail prices lower than the prices fixed by your orator and stamped upon the cartons and packages. Said system is known as the 'cut rate' or 'cut price' system and resulted in much confusion, trouble, and damage to your orator's business, and has injuriously affected the reputation and depleted the sale of your orator's remedies, medicines, and preparations. Thereupon, and in order to protect its trade, custom, and business, and the manufacture and sale of his remedies, medicines, and preparations, your orator has established and put in force the following methods and system of governing, regulating, and controlling the sale and marketing of your orator's said medicines, remedies, and preparations."

Then, after setting out the system of contracts, which is now sought to be enforced, it is said:

[44] "The entire purpose and object of the said system of contracts, serial numbers, lists, and cards being to prevent the cutting of prices and the demoralization of trade, both wholesale and retail in your orator's medicines and remedies, and the injury and damage resulting to your orator's aforesaid trade and business in the manufacture and sale of said remedies and medicines, as aforesaid, which said system and method your orator charges both in its form and purposes, and the prices therein fixed are reasonable, regular and proper, and which, if observed, will accomplish the aforesaid purposes and greatly benefit your orator in his aforesaid business by increasing the sales of and demands for his remedies, medicines, and preparations."

"These allegations," said the court below, "must be taken as true," and upon these he held that the complainants were advantaged by the covenants and injured if not so restrained. In this conclusion we cannot concur. *Prima facie* the contracts are plainly in restraint of trade. It was for the complainant to show that the covenants were not larger than

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necessary for his protection against an unjust use to the injury of complainant's retained business. Unless he could do this, he could not ask equitable relief under such covenants. This the bill does not do, unless the court is to be content with general averments that the competition methods called derisively the "cut rate" or "cut price" system had "demoralized," "confused," "troubled," and "damaged" the complainant's business. So, also, it is averred that the "system" had and will accomplish the suppression of the competition plan "and greatly benefit your orator in his business by increasing the sales of and demand for his remedies." Doubtless the "system" rigidly enforced will put an end to the "demoralization," the "trouble," and "confusion" incident to competition. But such an averment as this can be of no legal consequence, for it is no more than to say that a non-competitive system of conducting trade and traffic in the line of articles made by complainant is of more advantage than the ordinary competitive system. That the suppression of even unreasonable competition will sanctify an agreement or combination to restrain trade will not be claimed. The whole economic system which has made our civilization is founded upon the theory that competition is desirable, and the common-law rules against restraints of trade rest upon that foundation. A partial restraint of competition may be upheld when one sells a business or other property, provided it is no greater than necessary to enable the vendor to realize the value of his good will or to secure to the buyer the enjoyment of his purchase, or to prevent the use of the property to the prejudice of the seller. But here the only competition which the contracts in question tend to suppress is competition between those who buy his goods to sell again. How the suppression of competition between his vendees and subvendees is to secure to him the enjoyment of the legitimate fruits of his contracts of sale, to which the restrictive covenants are supposed to be ancillary, or to protect him against an unjust competition, is not clear, and the bill states no facts from which we can determine whether these covenants are necessary and reasonable. The general averment that under the "cut rate" plan of doing business, demorali-

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zation and damage resulted, while under the "contract system" enlarged sales and increased emoluments have and will follow, does not answer the question as to why such covenants are necessary to protect complainant against con- [45] sequences which may fairly require protection. Looking to the averments of the bill as a whole and to the scheme of business as disclosed by the contracts themselves, we cannot escape the conclusion that the covenants restricting sales and resales have as their prime object the suppression of competition between those who buy to sell again. Any benefit to the retained business to result from them is manifestly but an incident of the main purpose, which is to benefit his vendees and subvendees by breaking down their competition with each other. Restraints which might be upheld if ancillary to some principal contract cannot be enforced if, when unmasked, they appear to be the main purpose of the contract and not subordinate. The covenants in the contracts signed by the retailers are not even collateral to any sales by the complainant, but to sales made by the wholesalers. Although they run to the complaint, their prime purpose is neither the protection of the retained business of the complainant nor of the wholesaler, but only to prevent competition between retailers. Covenants protecting the seller of property against the competition of the buyer, by its use against the business retained by the seller, which are upheld if not wider than necessary for that purpose, have been covenants where the main purpose has been to protect the seller himself against competition directed against his retained business. No instance has been called to our attention where the main purpose and principle, if not only result, is to protect buyers against the competition of each other. If such a principle shall find lodgment in the law, it must be upon economic reasons which are in conflict with those which now prevail. The single direct effect of the "system of contracts" is to limit and restrain the right of each wholesaler and each retailer to transact business in the ordinary way. Each obtains a price enhanced by the "system" over the "cut rate" or "cut price" method which had before prevailed, and which it was the object of the new plan to abolish. It may be that sales went on as before; but at a higher price

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to the consumer than would otherwise have been paid. In *Addyston Pipe Co. v. United States*, 175 U. S. 211, 244, 20 Sup. Ct. 96, 44 L. Ed. 136, it was said: .

"We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made. Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade. It is the effect of the combination in limiting and restraining the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded."

It is no answer to such restrictive covenants that after all they only prevent injurious competition between such dealers and only result in maintenance of reasonable prices. These are not the tests by which the validity of such agreements are determined. In *People v. Sheldon*, 139 N. Y. 251, 264, 34 N. E. 785, 789, 23 L. R. A. 221, 36 Am. St. Rep. 690, it was said:

[46] "If agreements and combinations to prevent competition are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon an actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity although the moral evidence might be very convincing."

This principle was very strongly approved by this court in the *Addyston Pipe Case*, so frequently referred to, and many other cases cited in its support. It has been suggested that we should have regard to new commercial conditions and a tendency toward a relaxation of old common-law principles which tend to prevent development on modern lines. This is an argument better addressed to legislative bodies than to the courts. Neither is it wise for the courts to countenance the introduction of artificial distinctions dependent upon the variant economic views of individual judges. Distinctions which are specious or analogies which are but apparent will but afford opportunities to whittle away broad economic principles lying at the bottom of our public policy,

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principles which have long received the sanction of statesmen and the approving recognition of a long line of jurists. A like argument is expected whenever some new method of circumventing freedom of commerce comes under the tests of the law. It was made and answered by Judge Taft in the *Addyston Pipe Case* with a strength to which we can add nothing.

Our conclusion is that complainant's system of contracts is not enforceable. The injunction must be discharged.

The case will be remanded, with directions to proceed as may be consistent with this opinion.

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[943] AMERICAN BANANA CO. v. UNITED FRUIT CO.\*

(Circuit Court, S. D. New York. January 28, 1907.)

[153 Fed. Rep. 943.]

DISCOVERY—PRODUCTION OF BOOKS AND WRITINGS—FEDERAL STATUTE.—

In a proper case a party may be required to produce books and writings under Rev. St. § 724 [U. S. Comp. St. 1901, p. 583], in advance of trial,<sup>b</sup> but such a direction should only be made when the situation is clearly such that in no other way can the ends of justice be properly subserved.<sup>c</sup>

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Discovery, § 107.]

EVIDENCE—REQUIRING PRODUCTION OF DOCUMENTS—CORPORATIONS.—

An action to recover treble damages under the Sherman anti-trust act (Act July 2, 1890, c. 647, § 7, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]), is penal in character, but such fact does not preclude the court from requiring the defendant, when a corporation, to produce books or writings under Rev. St. § 724 [U. S. Comp. St. 1901, p. 583].

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1540-1553.]

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\* For other opinions in this case see 160 Fed. Rep., 184, *post*, page 372; 166 Fed. Rep., 261, *post*, page 563; 213 U. S., 347, *post*, page 648.

<sup>b</sup> See *contra*; *Carpenter v. Winn*, 221, U. S., 533.

<sup>c</sup> Syllabus copyrighted, 1907, by West Publishing Co.



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At Law. Motion under section 724, Rev. St. U. S. [U. S. Comp. St. 1901, p. 583], to require the production before trial and deposit with the clerk for defendant's inspection of a great number of books and papers the property of defendant now in its custody and concerned with details of its business. The action is for treble damages under the Sherman anti-trust act.

*Everett P. Wheeler*, for the motion.

*Henry W. Taft*, opposed.

LACOMBE, Circuit Judge.

Originally it was held that the provisions of section 724, Rev. St. [U. S. Comp. St. 1901, p. 583], were directed solely to securing the production of the books and writings upon the trial of the issues. Later authorities hold that in a proper case production in advance of trial may be required. *Bloede Co. v. Bancroft Co.* (C. C.) 98 Fed. 175; *Gray v. Schneider* (C. C.) 119 Fed. 474. Such a direction, however, should only be made when the situation is clearly such that in no other way could the ends of justice be properly subserved. The "trial" of an action at common law is to be had before a court and jury and questions as to the admissibility or inadmissibility of individual items of evidence can be ruled on intelligently and fairly only by the judge who is presiding at the trial and is fully informed as to all the circumstances which prior evidence has disclosed. It puts an unreasonable burden upon a court, already fully occupied, to sit in advance of the trial to oversee the clerk with whom papers are deposited and to be called upon summarily and at intervals to determine whether some particular letter or telegram is one which a plaintiff might fairly inspect, or is concerned with matters which are none of plaintiff's business. Sometimes no other course can be followed, but such is not the case here. The averments of the complaint, the statements in the affidavits, and the specifications in the notice of motion all show that the plaintiff is supplied with information amply sufficient to enable it to go to trial and undertake to make out its cause of action by there and then calling for such writings as it needs, provided that their [944] pres-

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ence on the trial is secured by order made under this section. The section does not contemplate that plaintiff shall sit down at leisure in the absence alike of court and jury, and during days or weeks prepare and practically put in its side of the controversy, leaving defendant to meet the case thus made in the hurry of the trial.

As to the constitutional question. It seems entirely clear that this is a penal action. It is instituted by a person who claims to have been injured by the unlawful acts of defendant to recover, not only the damages which will compensate him for any loss he has sustained, but also a penalty of twice as much again, which represents no damages, but only a fine imposed for bad conduct. But, as was intimated in *U. S. v. Am. Tob. Co.* (C. C.) 146 Fed. 557, the decision in *Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652, has modified the rule heretofore applied when the books and papers sought to be dragged to light by the power of the state are the property of a corporation. It was held in that case that neither the provisions of the fourth amendment to the Constitution nor the principles enunciated in the case of an individual in the *Boyd Case*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, constitute any protection to a corporation which is charged with abuse of its franchise. It would seem to make little difference whether the books and papers are called for under a subpoena duces tecum or under section 724; whether the charge is presented in an action brought by the state of its own motion, by the state on the relation of some one, or by a private person to whom the state has promised the fine it has prescribed as punishment of the offense in the event that such person shall succeed in proving the commission of that offense.

The motion is granted to the extent of requiring the defendant to get together all the books and papers enumerated with sufficient definiteness, and have them present at the trial. Defendant need be under no apprehension by reason of failure to produce any books and papers called for which do not exist. Proof that they did not exist, when notice of motion was served, will be sufficient compliance with the order. But it should comply with the terms of the order frankly and fully. It should have in court all the documents

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fairly within the enumeration and which would enable plaintiff to show defendant's past conduct touching the matters complained of. It will be no sufficient response to the order to state upon the trial that some contract, letter, or what not, manifestly material, is not at hand, but in Venezuela or elsewhere.

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[268] UNITED STATES *v.* TERMINAL R. ASS'N  
ET AL.<sup>a</sup>

(Circuit Court, E. D. Missouri, E. D. June 11, 1907.)

[154 Fed. Rep., 268.]

**WITNESSES—SUBPŒNA DUCES TECUM—SUFFICIENCY OF APPLICATION.—**

A petition for a subpoena duces tecum is sufficiently definite with respect to the books or documents required, where the description is specific enough to enable the witness to produce them without uncertainty.<sup>b</sup>

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 22.]

**SAME.**—To entitle a party to a subpoena duces tecum requiring a witness not a party to the action to produce books and documents in his possession, it is not sufficient to allege merely that the documents are material and relevant to the issues in the case; but the facts that will enable the court to determine that they are prima facie material and relevant must be set out.

In Equity. On motion to quash subpoena duces tecum.  
See 148 Fed. 486.

This is an action under the Sherman Anti-Trust Act to enjoin the defendants from continuing in an unlawful combination to fix passenger rates, etc. Upon an ex parte application of the complainant the court directed the issuance of a subpoena duces tecum directed to J. E. Hannegan, who is not a party to the action, to appear before the special master to whom the cause had been referred and produce there certain books and documents described in the petition for the subpoena, to be used as testimony. The witness, having been duly served with the subpoena, now comes into court and moves the court to quash the subpoena as having been improvidently issued. Accompanying the petition is an affidavit of the witness, admitting that he has in his possession the records and documents called for by the

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<sup>a</sup> For prior opinion (148 Fed. Rep. 486) see *ante*, page 34.

<sup>b</sup> Syllabus copyrighted, 1907, by West Publishing Co.

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subpoena, but denying that said records, papers, and letters "relate to passenger rates and the fixing thereof by the agents and representatives of the defendants in the cause, and to meetings held to fix and maintain uniform rates by the defendants." The motion to quash alleges as grounds, first, that the description of the documents is too general; and, second, that the petition merely states that the evidence is material and relevant to the issues involved in the cause, but fails to state specifically any of the facts which will show that they are either material or relevant. The original petition for the subpoena merely states that the books and documents called for are material and relevant evidence in the cause, but does not state any of the facts to show that they are either relevant or material.

*John F. Lee and Robert & Robert*, for the motion.

*H. W. Blodgett*, U. S. Atty., *Chester H. Crum*, and *E. C. Crowe*, opposed.

TRIEBER, District Judge (after stating the facts).

The description of the documents and books called for is specific enough to enable the witness to produce them without any inconvenience. It is not so general as to warrant the inference that they are wanted merely for a [269] "fishing examination." For this reason that ground of the motion to quash cannot be sustained.

The important question to be determined is whether, on an application for a subpoena duces tecum, it is sufficient for the mover to allege merely "that the documents desired are material and relevant to the issue in that cause," as alleged in the petition, or whether the facts should be set out sufficiently full in order to enable the court to determine whether the documents to be produced are in fact at least prima facie material and relevant to the issues of the cause. As a general rule, conclusions of law are not sufficient in any pleading. The pleader must state the facts, and it is for the court to determine, from a consideration of them, whether they are sufficient in law to entitle the party to the relief sought. Does that rule apply to a petition for a subpoena duces tecum? It is important to remember that the documents are not sought from one of the parties to the action, nor for the purpose of discovery, but as evidence in the possession of the witness who is not a party to this action.

## Opinion of the Court.

In *Phelps v. Prothero*, 2 De Gex & Smale, 274, 290, the same question was before the court. Vice Chancellor Bruce, before whom the matter came, in denying the motion, said:

"The deeds are not sought for the purpose of discovery. \* \* \* As to the other documents, it may as a general rule be true that, when a witness is required to produce documents in his custody, he ought to produce them simply and leave to the court adjudicating between the parties to decide whether they are evidence; but my impression is that on a motion of this kind the court is bound to exercise a discretion not to order a document to be produced unless some reason is shown rendering it probable that it will be evidence between the parties in the cause. Now, as to the documents in question, I do not see any ground for supposing that they would be evidence between the parties upon the record, and I do not think that the court ought to compel the private documents of a third person to be produced, without some probability, to say the least, of their being useful for some purpose between the parties. Upon this ground, without entering into the other objections, and without giving any opinion upon them, I think that the court ought not to interfere."

In *Hale v. Henkel*, 201 U. S. 43, 77, 26 Sup. Ct. 370, 380 (50 L. Ed. 652), the court, in speaking of a general order to produce books under a subpoena duces tecum, say:

"Doubtless many, if not all, of these documents may ultimately be required; but some necessity should be shown, either from an examination of the witnesses orally or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers. A general subpoena of this description is equally as indefensible as a search warrant would be, if couched in the same terms"—citing *Ex parte Brown*, 72 Mo. 83, 37 Am. Rep. 426; *Shaftsbury v. Arrowsmith*, 4 Ves. 68; *Lee v. Angus*, L. R. 2 Eq. 59.

In *Ex parte Peck*, 3 Blatchf. 113, Fed. Cas. No. 10,885, there was a motion for an attachment for an alleged contempt, the witness refusing to obey a subpoena duces tecum, and it was held that, before he could be held guilty of a contempt:

"It must also be shown that the witness was called to testify to facts material and relevant to the issue in the cause. The court will interfere in this summary way only to aid the plain demands of justice, and will not [270] attach a witness for neglecting to testify without evidence that his testimony is pertinent to the case and such as the party is entitled by law to demand."

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In *Re Judson*, 8 Blatchf. 116, Fed. Cas. No. 7,568, the same learned judge said:

"I see no reason why any more stringent obligation should be imposed upon a witness in these outside examinations than is enforced in court. Before the court will adjudge a witness to be in contempt, or commit him therefor, it will require more than proof that he declines to respond to a question. It will inquire whether the question is relevant and material to the case or hearing, and also whether the witness is legally exempt from answering it."

In *United States v. Tilden*, 10 Ben. 566, Fed. Cas. No. 16, 522, it was held:

"I have \* \* \* reached the conclusion that, under the law, it is competent for the court to issue a subpoena duces tecum to compel the production upon the examination of books and papers which would be competent evidence in the cause."

It will be noticed that the court did not hold that it had the power, by a subpoena duces tecum, to call for the production of any papers, but only those "which would be competent evidence in the case." It follows necessarily, from this limitation of the court's power, that a subpoena duces tecum should not issue as of course, but only under some restrictions, such as a prior investigation into the materiality of the evidence called for.

In *Bischoffsheim v. Brown*, (C. C.) 29 Fed. 341, it was held that:

"The books, papers, and documents asked to be produced not being shown to be material or relevant, the motion for a subpoena duces tecum must be denied."

In *United States v. Hunter* (D. C.) 15 Fed. 712, there was a motion, as in this case, to quash a subpoena duces tecum which had been issued on an ex parte petition and served on a telegraph operator, commanding him to produce certain telegrams in his possession. The court, after stating what allegations are necessary in the application for the subpoena, gives the reason therefor as follows:

"In order that the court or judge ordering the subpoena may have some means of judging the relevancy of the testimony sought."

In *Dancel v. Goodyear Shoe Machinery Co.* (C. C.) 128 Fed. 753, 760, an application for a subpoena duces tecum

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under section 863, Rev. St. [U. S. Comp. St. 1901, p. 661], was denied because it did not appear prima facie from the allegations in the petition that the documents called for were "material and necessary", although in the petition it was stated that they were material and necessary. Judge Colt, who delivered the opinion in that case, after a very exhaustive review of the authorities on the subject, said:

"A party undoubtedly has the right to invoke the process of the court to compel the attendance of witnesses and the production of such papers as are material to his case; but neither the right of a party nor the power of the court extends beyond this. A party has no right, and the court has no power, to compel the production, either in court or before a magistrate, of the private papers of a witness which are not relevant and material to the case. Any practice which sanctions such a proceeding is unwarranted and [271] an infringement upon a fundamental personal right guaranteed by the federal Constitution. The courts have always recognized this protection to the individual secured by our organic law. Such recognition is seen in the distinction which is made between a subpoena ad testificandum and a subpoena duces tecum. The former is a process of right, while the latter is addressed to the discretion of the court. The discretion here does not mean that the court has power to refuse the compulsive production of a paper which is material evidence in the case, but that before compelling its production by a subpoena duces tecum it will sufficiently inquire into the matter to determine if the evidence appears to be material, and, if not satisfied on this point, it will decline to issue the writ."

In *Crocker-Wheeler Co. v. Bullock* (C. C.) 134 Fed. 241, a similar question was before the court, and it was there held that the facts sought to be proven by the books sought to have produced by the subpoena were not relevant or material to the issues in the cause, and that for this reason the witness had a legal right to withhold them.

The only cases cited to the court by the learned counsel for the complainant as opposed to these views and sustaining the contention of complainant that a mere allegation in the petition for the subpoena that "the said books and papers are material and necessary evidence in said cause" is sufficient, are *United States v. Babcock*, 3 Dill. 566, Fed. Cas. No. 14,484, and an opinion by Judge Finkelnburg in this case (C. C.) 148 F. 486. As Judge Finkelnburg practically

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adopts Judge Dillon's views as expressed in the *Babcock Case*, it is only necessary to refer to that opinion, which was an oral opinion delivered by Judge Dillon, concurred in by Judge Treat. The great learning of that eminent jurist entitles his opinions to the very highest consideration, but they are not of binding authority. It will be noticed that Judge Dillon cites no authorities to sustain his conclusion, and in view of the fact that the decision was made in the midst of an important trial before a jury, and delivered orally, the learned judge probably failed to give it that careful consideration which he usually gave to his opinions. In fact, it seems this matter was not insisted on by counsel, for the learned judge says:

"But Mr. Shepley suggested in argument that there was no sufficient showing that these papers were material, but we understood him finally not to insist on that point."

In *Ex parte Brown*, 72 Mo. 83, 96, 37 Am. Rep. 426, a very carefully considered case on that subject, the court expressly declined to follow that case, saying:

"The case of *Babcock v. United States*, 3 Dill. 567, Fed. Cas. No. 14,484, relied upon as an authority as to the sufficiency of the identification of the telegrams, supports the view it is cited to sustain; but, with the highest respect for the learning and ability of the judges who granted the order for the subpoena in that case, we cannot agree with them. Their opinion, delivered by Judge Dillon, is totally at variance with our convictions on the subject."

This decision of the Supreme Court of Missouri was cited with approbation and followed by the Supreme Court of the United States in *Hale v. Henkel*, supra, thus practically adopting the refusal of that court to follow the views of Judge Dillon in *United States v. Babcock*.

Section 869, Rev. St. [U. S. Comp. St. 1901, p. 665], although [272] applicable only to depositions taken under a *dedimus potestatum*, provides for authority to issue a subpoena duces tecum upon "such judge being satisfied by the affidavit of the person applying, or otherwise, that there is reason to believe that such paper, writing, written instrument, book or other document is in the possession or power of the witness and that the same, if produced, would be



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competent and material evidence for the party applying therefor"—thus showing that Congress, in legislating upon this subject, has carefully restricted the power of the courts to cases in which the evidence is relevant and material.

The allegation of counsel in the petition that the evidence is material or relevant is but a conclusion of law. It is for the court to determine from the facts set out in the petition, or perhaps other proofs, whether the documents, when produced, will be relevant and material. In my opinion, in order to entitle a party to a subpoena duces tecum requiring a witness not a party to the action to produce books and documents in his possession, it is not sufficient to allege merely that the documents required are material or relevant to the issues; but the facts which will show the court that they are relevant and material must be set out, in order to enable the court to determine that fact.

Seeking the production of papers and documents for the purpose of finding out whether or not they contain information valuable to the party demanding them has been aptly denominated a "fishing examination," and is always regarded as oppressive, and as such denied. 2 Elliott on Evidence, § 1410; *United States v. Tilden*, supra. At the same time, the court, in passing on the question of materiality or relevancy, will not be governed by the strict rules of evidence governing the admissibility of evidence on final hearing. That will be left for determination at the hearing. It is sufficient if the facts set out in the petition or the proofs adduced show a prima facie case, or sufficient to enable the court to say that there is reasonable cause to believe that such evidence is relevant or material; or, as stated by Judge Colt in *Dancel v. Goodyear Shoe Machinery Co.*, supra:

"The court will not finally determine the question of materiality on such application, but it must be reasonably satisfied that the evidence is relevant and material."

From the allegations in the petition for the subpoena duces tecum, the court is unable to determine whether such is the fact, and for this reason the order for the subpoena was improvidently granted, and the motion to quash is sustained, without prejudice to the filing of another petition.

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**[358] RUBBER TIRE WHEEL CO. v. MILWAUKEE  
RUBBER WORKS CO.**

(Circuit Court of Appeals, Seventh Circuit. April 16, 1907.)

[154 Fed. Rep., 353.]

**PATENTS—SCOPE OF MONOPOLY GRANTED—EFFECT OF STATE STATUTES.—**

A state statute cannot interfere with the monopoly granted to a patentee and his assignees under the federal laws.\*

**SAME—POLICY OF PATENT LAWS.—**The public policy declared by the patent laws is that it is for the benefit of the public to stimulate invention and that inventors shall publish their inventions, and to that end, and in consideration of such publication, to become effective at the end of 17 years, they insure to a patentee in the meantime absolute protection in the right to exclude every one else from making, using, or vending the thing patented without his consent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 1.]

**SAME—LICENSES—LEGALITY OF CONDITIONS.—**Use of a patented invention cannot be had except on the inventor's terms, and the requirement that a licensee join other licensees in a combination or pool to control the prices and output of an innocuous patented article is not in violation of the Sherman anti-trust act of July 2, 1890 (26 Stat. 209, c. 647, § 1 [U. S. Comp. St. 1901, p. 3200]). Patented articles, unless and until they are released by the owner of the patent from the dominion of his monopoly, are not articles of trade or commerce among the several states within the meaning of such act, because they are not articles in which the people are entitled to freedom of trade.

**SAME—DECREE ADJUDGING INVALIDITY—SCOPE AND EFFECT.—**A suit for infringement of a patent is not a proceeding in rem, and a decree of a Circuit Court of Appeals in such a suit adjudging a patent void is binding only on the parties, and does not affect the validity of a license contract subsequently made between the owner of the patent and others, which is enforceable as fully and to the same extent in the circuit in which such decree was rendered as elsewhere in the United States.

**[359] SAME—LICENSE CONTRACTS—LEGALITY.—**A system of contracts between the owner of a patent for rubber-tired wheels and its licensees, fixing uniform prices and the percentage of the whole output which should be made and sold by each licensee, and providing that the business of all should be supervised by commissioners appointed by the licensor, is not rendered invalid by a provision for the accumulation of a fund by such commissioners

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with power to use the same with the consent of a majority in the purchase of tires from any or all of the licensees and to sell the same to the trade at such prices as they should deem for the best interest of all; it being within the right of the owner of the patent, either itself or through its licensees, to push the sale of its tires, and, in doing so, to undersell the makers of other tires or infringers.

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

For opinion below, see 142 Fed. 531.

*A. L. Humes* and *Edwin E. Jackson, jr.*, for plaintiff in error.

*Charles Quarles*, for defendant in error.

Before GROSSCUP, BAKER, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge.

Plaintiff in error began this action to recover royalties on account of defendant's use, under a license system set forth in the complaint, of patent No. 554,675, issued February 18, 1896, to Grant, plaintiff's assignor, for an improvement in rubber-tired wheels. The license system was embodied in three papers, Exhibits A, B, and C. That they "were all executed at one and the same time and were intended to constitute and did constitute one agreement" is not open to question, for such is the explicit admission in defendant's answer. The covenants of defendant must therefore be taken as having been made in consideration of plaintiff's grant. The license system, briefly, was this: Plaintiff authorized 18 companies, of which defendant was one, to make, use, and sell tires under the patent for 1 year; each company's share of the trade was fixed at a certain proportion of the whole, defendant's at 2 per cent.; two qualities of tires were to be made; the minimum selling price of the first quality was established at 65 cents a pound, of the second quality at 55 cents a pound; each company agreed to pay plaintiff monthly 4 per cent. of its sales, and, if in any month its sales proved to be larger than its proportional share of the total sales for that month, to pay plaintiff an additional royalty of 20 per cent. of the amount over its quota; plaintiff agreed to employ a commission of five persons to supervise the transac-

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tions of all the parties, and to turn over to the commission all royalties in excess of 2 per cent.; from the moneys so put into their hands the commission, after deducting their expenses and compensation for services in supervising and auditing, were to pay monthly to any company that had sold less than its quota of the preceding month's total business a sum equal to 20 per cent. of such deficiency; the commission then were to accumulate \$50,000, and to distribute any sums in excess monthly among the companies according to their quotas of the trade, and at the expiration of the arrangement to distribute all funds then on hand; and it was agreed in paragraph 10 "that the commission shall have power upon the written consent of a [360] majority of the parties in interest hereto, to purchase tires from any or all of the parties hereto at the prices hereinbefore provided and to dispose of such tires to the trade at such prices as said commission shall deem to be in the interest of all the parties hereto, and in making such purchases the commission is hereby authorized to use any money in its possession." The complaint proceeded to charge that defendant under this arrangement had made and sold certain amounts of the patented tires on which it had failed and refused to pay the stipulated royalties.

The defenses were that the arrangement was in violation of the Sherman anti-trust act of July 2, 1890 (26 Stat. 209, c. 647, § 1 [U. S. Comp. St. 1901, p. 3200]), and of section 1791j of the Wisconsin Statutes of 1898, which prohibits Wisconsin corporations (defendant was one) from entering into any arrangement or contract intended to restrain competition in the supply or price of any commodity constituting a subject of commerce within the state. As reasons why defendant's promise to pay was unenforceable in the face of those statutes, the answer averred that the letters patent "were and were believed by all the parties to said agreement to be invalid and void, and had been so adjudged by the United States Circuit Court of Appeals for the Sixth Circuit, and that the Supreme Court of the United States had refused to review such decision; that said patent was resorted to in said contracts merely as a pretext to enable said

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contracting parties to evade the laws; and that said contracts were not and were not intended to be license contracts under letters patent, but were intended to establish and bring about the illegal trade combination herein mentioned; that the aforesaid purpose was carried out by the said agreement, and by reason thereof the price of the articles of commerce mentioned in plaintiff's complaint was raised beyond the former price thereof and beyond the natural and legitimate price thereof; and that the amount of said articles manufactured by the said parties was, by reason of said combination and monopoly, restricted."

A jury having been duly waived, the court heard the evidence, entered findings of fact and conclusions of law, and thereupon rendered judgment for defendant.

The court found that plaintiff was the owner of the patent; that the patent was valid; that prior to the execution of the contracts in suit the patent had been sustained by the Circuit Court for the Southern District of New York, 91 Fed. 978, by the Circuit Court for the Southern District of Ohio (unreported), by the Circuit Court for the Northern District of Georgia, 116 Fed. 629, and by the Court of Appeals for the Republic of France, and had been declared invalid by the Circuit Court of Appeals for the Sixth Circuit, 116 Fed. 363, 53 C. C. A. 583, and the Supreme Court had declined to take the case on certiorari, 187 U. S. 641; that after the last-named decision was rendered, and down to the execution of the contracts in suit, the manufacturers of tires disregarded the patent, paid no royalties, and cut the prices of the respective qualities to 50 and 40 cents a pound; that all of the parties to the contracts in suit entered into the arrangement in good faith, believing that the patent was valid and that the adverse decision was erroneous; that all of the manufacturers that had been infrin[361]ging, except two small concerns, came into the pool; that the provision in paragraph 10 was never in any manner acted upon or executed; that defendant made and sold tires under the contracts, and failed to pay plaintiff certain specified sums which were due if the promise to pay was enforceable; that after the expiration of the arrangement prices went back to former rates.

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As conclusions of law the court stated (1) that the patent was and is valid; (2) that the decision of the Court of Appeals for the Sixth Circuit is controlling only between the parties to that case and their privies; (3) that as a practical result, however, the effect of that decision is to denude the patent of the attributes of a monopoly in that circuit; (4) that the provisions of the contracts respecting the payment of royalties are separate from the provisions of paragraph 10, and are not thereby rendered illegal or void; (5) that the contracts authorized the creation of a fund for crushing competition in interstate commerce throughout the whole country, not only in Grant tires but in all other rubber tires; (6) that the contracts make an illegal combination under the laws of the United States, and are illegal and void.

The assignments of error go to the third, fifth, and sixth conclusions of law.

The Wisconsin statute is eliminated not only because it is not involved in any assignment of error, but also because a state cannot subtract from the right conferred upon a patentee and his assigns by the federal laws. *Columbia Wire Co. v. Freeman Wire Co.* (C. C.) 71 Fed. 302; *U. S. Consolidated Seeded Raisin Co. v. Griffin & Skelly Co.*, 126 Fed. 364, 61 C. C. A. 384. For the protection of the physical or moral health of its citizens a state may restrain the use of "the corporeal thing or article brought into existence by the application of the patented discovery" (*Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115), but such a laying on of hands does not touch the monopoly of the federal grant. Nothing in this record questions the innocence of rubber tires.

Apart from any support that may be afforded by the third and fifth conclusions, is the sixth conclusion sound? Does the Sherman law shield the defendant from its promise to pay?

Under its constitutional right to legislate for the promotion of the useful arts, Congress passed the patent statutes. The public policy thereby declared is this: Inventive minds may fail to produce many useful things that they would produce if stimulated by the promise of a substantial reward;

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what is produced is the property of the inventor; he and his heirs and assigns may hold it as a secret till the end of time; the public would be largely benefited by obtaining conveyances of these new properties; so the people through their representatives say to the inventor: Deed us your property, possession to be yielded at the end of 17 years, and in the meantime we will protect you absolutely in the right to exclude every one from making, using, or vending the thing patented, without your permission. *Bloomer v. McQuewan*, 14 How. 539, 14 L. Ed. 532; *United States v. American Bell Telephone Co.*, 167 U. S. 224, 17 Sup. Ct. 809, 42 L. Ed. 144; *Bement v. National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; *Good v. Daland*, 121 N. Y. 1, 24 N. E. 15; *Fuller v. Berg[362]er*, 120 Fed. 274, 56 C. C. A. 588, 65 L. R. A. 381; *Victor Talking Machine Co. v. The Fair*, 123 Fed. 424, 61 C. C. A. 58; *Rupp-Wittgenfeld Co. v. Elliott*, 131 Fed. 730, 65 C. C. A. 544. Congress put no limitations, excepting time, upon the monopoly. Courts can create none without legislating. The monopoly is of the invention, the mental concept as distinguished from the materials that are brought together to give it a body. Use of the materials, as noted above, may be enjoined as injurious to the public; but that does not invade the monopoly. Use of the invention cannot be had except on the inventor's terms. Without paying or doing whatever he exacts, no one can be exempted from his right to exclude. Whatever the terms, courts will enforce them, provided only that the licensee is not thereby required to violate some law outside of the patent law, like the doing of murder or arson. Does the requirement that the licensee joint other licensees in a combination or pool to control the prices and output of an innocuous patented article violate the Sherman law? We cannot dispose of the question on the authority of *Bement v. National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058 (see *United States Consolidated Seeded Raisin Co. v. Griffn & Skelly Co.*, 126 Fed. 364, 61 C. C. A. 334), for according to our reading the question was expressly excepted from the decision; and so, aided by the declarations of general principles in that and other cases, we must formulate our own answer.

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Under its constitutional right to regulate interstate commerce Congress made illegal "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states," and subjected to liability to fine or imprisonment "every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states." Congress, having created the patent law, had the right to repeal or modify it, in whole or in part, directly or by necessary implication. The Sherman law contains no reference to the patent law. Each was passed under a separate and distinct constitutional grant of power; each was passed professedly to advantage the public; the necessary implication is not that one iota was taken away from the patent law; the necessary implication is that patented articles, unless or until they are released by the owner of the patent from the dominion of his monopoly, are not articles of trade or commerce among the several states. The evils to be remedied by the Sherman law are well understood. Articles in which the people are entitled to freedom of trade were being taken as the subjects of monopoly; instrumentalities of commerce between which the people are entitled to free competition were being combined. The means of effecting and the form of the combination are immaterial; the result is the criterion. The true test of violation of the Sherman law is whether the people are injured, whether they are deprived of something to which they have a right. *Northern Securities Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679.

Grant produced a new integer in the useful arts. See *Consolidated Rubber Tire Co. v. Firestone Tire & Rubber Co.* (C. C. A., Second [363] Circuit, February 1, 1907) 151 Fed. 237. Plaintiff, as his successor in interest, is the owner of a valid patent. That stands as an unquestionable fact on this writ of error. The only grant to the patentee was the right to exclude others, to have and to hold for himself and his assigns a monopoly, not a right limited or conditioned according to the sentiment of judges, but an absolute monopoly constitutionally conferred by the sovereign lawmakers.



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Over and above an absolute monopoly created by law, how can there be a further and an unlawful monopoly in the same thing? If plaintiff were the sole maker of Grant tires, how could plaintiff's control of prices and output injure the people, deprive them of something to which they have a right? Is a greater injury or deprivation inflicted, if plaintiff authorizes a combination or pool to do what plaintiff can do directly? To say yes means that substance is disregarded, that mere words confer upon the people some sort of a right or interest counter to the monopoly, when by the terms of the bargain the people agreed to claim none until Grant's deed to them shall have matured.

True that "it is as important to the public that competition should not be repressed by worthless patents as that the patentee of a really valuable invention should be protected in his monopoly." *Pope Mfg. Co. v. Gormully*, 144 U. S. 224, 234, 12 Sup. Ct. 632, 36 L. Ed. 414. But worthless patents and other supposititious cases are not on review.

What is stated as the third conclusion of law does not affect the result. The case in the Court of Appeals for the Sixth Circuit was not a proceeding in rem. The defendant in that particular suit has a decree on which, if he were again sued for infringement of the Grant patent, he could base a plea of res adjudicata. That plea would be as good in the other circuits as in the Sixth. No other member of the public could plead that decree in any circuit. The right conclusion of law from the facts found is that, so far as the parties to the contract in suit are concerned, the patent is valid throughout the United States, and is enforceable against every one who is not able to shield himself behind an erroneous decree. If any inference of fact (or prophecy) was to be drawn from the facts found, it should have been that the Court of Appeals for the Sixth Circuit will not exempt other members of the public from the monopoly of the Grant patent. That infringers may be more contumacious in one locality than in another does not change the rights of the parties before the court. If defendant, or any other of those who entered the pool, had been before the court below in an infringement suit, the validity of the patent and defendant's use thereof without license would have compelled a decree enjoining the sale

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of the patented articles in Michigan, Ohio, Kentucky and Tennessee and requiring an accounting of sales already made. Consequently there was full warrant for the parties to the contract in suit to agree to pay for the use of the patent throughout the United States.

None of the provisions of the contract, in our judgment, touched any matter outside of the monopoly under the patent. The control of prices and output, for reasons already stated, did not deprive the public of any right. Both before and after the period covered by the contract the market was demoralized, prices were cut, and the owner [364] of the patent was getting nothing except by the slow and expensive process of litigation; but the public was not entitled to profit by competition among infringers. The internal agreements relating to royalties, proportioning the business, supervision, and penalties, did not affect or concern the public at all. Equally innocuous, in our view, was the matter stated as the fifth conclusion of law. First, the public was not injured, because the finding of fact is that the provision was never acted upon in any way. Second, if a defense had been predicated on the presence of that provision in the contract, it would have been unavailing, because that provision is separable from the royalty and other valid parts of the contract. And, third, the owner of the patent had the right, either alone or through licensees, to accumulate funds with which to push the Grant tire on the market, and in so doing to undersell the makers or other tires and infringing makers of the Grant tires. It is not for a defendant's sake that courts listen to the defense that he ought not to pay because his promise was under an arrangement to injure the public. The public is not injured by an arrangement to compete with adversaries for the public's patronage.

The evidence has not been brought up. No assignment of error questions the fullness and accuracy of the finding of facts. No cross-assignment has been made. The amount due, with interest to the date of entering the judgment hereby directed, can be computed.

The judgment is therefore reversed with the direction to enter judgment in plaintiff's favor.

Grosscup, J., concurring.

GROSSCUP, Circuit Judge (concurring).

I concur in the foregoing judgment; but am not prepared to hold that patented articles are never, under any circumstances, articles of trade or commerce among the several states, within the meaning of the Sherman Act; and do not think that that premise is essential to the conclusion arrived at.

The patentee, in this case, in good faith believed the patent valid, as did also all the parties entering into the contracts. Whatever, therefore, their effect may have actually been, the contracts were not intended to affect prices, except as the parties believed they had the right, because of the patent, to fix and maintain prices.

Now were the patentee the manufacturer, he would unquestionably have had the right to fix and maintain his own prices; and were the other parties to the contract manufacturers for the patentee, at a given figure for such manufacture, the patentee's right to fix and maintain the selling price would still remain; nor could this be questioned were he to make the manufacturers his selling agents also. How, then, does the contract under review make a case in which the patentee, through his manufacturer, is not entitled to fix and maintain prices—how is the arrangement, in effect, different in any way of restraining trade or competition, from the arrangement just supposed, in which the patentee unquestionably has that right?

True, in the case under review, the manufacturers, as to the public, are not competitors; but neither would they be in the cases supposed; in both cases the public suffering nothing, except what the patentee had the right to exact; for so long, at least, as the patente is not [365] exacting, as the value of his invention, an unreasonable sum (and his action in that respect is not here questioned) it is within his own right to say whether the price exacted should be retained by himself, or shall be distributed among the people manufacturing for him. The contracts, therefore, in the case before us, having been made in good faith, and not as a mere subterfuge, I can see in them nothing that the Sherman Act was intended to prevent.

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INDIANA MFG. CO. *v.* J. I. CASE THRESHING  
MACH. CO.\*

(Circuit Court of Appeals, Seventh Circuit. April 16, 1907.)

[154 Fed. Rep., 365.]

**PATENTS—INFRINGEMENT—SUIT BY OWNER AGAINST LICENSEE.**—A suit by the owner of patents to enjoin a licensee from using any of the patented devices except on the terms imposed by the license contract is not one for the specific performance of the contract, but is one to enjoin infringement of the patents by excluding defendant from that part of the patent domain not granted by the contract, and is maintainable in a federal court of equity irrespective of the validity of the contract.<sup>b</sup>

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 312.]

Jurisdiction of federal courts in suits relating to patents, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

**SAME—VALIDITY AND SCOPE—PNEUMATIC STRAW STACKERS.**—The Buchanan patent No. 467,476, for a pneumatic straw stacker, covers the uniting of old elements to form a novel and useful combination of a generic character, and its claims are not limited in scope by anything in the prior art. Such patent is dominant in the art, and the patents to Nethery, Nos. 493,734 and 517,475, and to Landis, Nos. 512,553 and 514,266, are for improvements only and subordinate thereto, and the uniting of all in a single ownership is not therefore in restraint of competition.

**MONOPOLIES—RESTRAINT OF TRADE—CONTRACTS RELATING TO PATENTED ARTICLES.**—Complainant, which was the owner of a number of patents relating to pneumatic straw stackers, granted licenses to manufacturers of threshing machines by which they were given the right to use any or all inventions covered by such patents and required to sell stackers made thereunder at a stated price and to pay complainant a royalty on each stacker so made and sold. They were also given the right to use the inventions covered by any other patents relating to the art which should thereafter be acquired by complainant, and it did afterward acquire the ownership of practically all patents relating to such stackers. *Held*, that such contracts were not in restraint of competition and in violation of the Sherman anti-trust act of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), but were within complainant's right under the patent laws, although all of the manufacturers of threshing machines in the United States became licensees, there being no right in the public to free competition in articles covered by patents.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Monopolies, §§ 11, 13.]

\* For opinion of Circuit Court (148 Fed. Rep., 21) see *ante*, page 19.

<sup>b</sup> Syllabus copyrighted, 1907, by West Publishing Co.

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Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

*Charles C. Linthicum* and *W. H. H. Miller*, for appellant.

*Robert S. Taylor* and *I. K. Boyesen*, for appellee.

Before GROSSCUP, BAKER, and KOHLBAAT, Circuit Judges.

[366] BAKER, Circuit Judge.

The appeal is from a final decree dismissing appellant's bill for want of equity. 148 Fed. 21.

A sufficient outline of the bill is this: Appellant owns certain patents on pneumatic straw stackers; in 1895 appellant licensed appellee for the lives of the patents to make, use, and sell stackers embodying any of the inventions then owned or thereafter acquired by appellant, and used by appellee, on the terms that appellee maintain the price at \$250, put on the patent marks, and pay appellant \$30 royalty, and that appellant give appellee the benefit of any more favorable terms extended to subsequent licensees; appellee accounted until 1902; in that year appellee sold stackers under the license, but refused to pay \$40,000 royalties that accrued; beginning in 1902 appellee made a so-called "Norton stacker," omitted appellant's patent marks, refused to pay royalty on the ground that the Norton stacker did not embody any of the inventions covered by appellant's patents, and threatened to put that stacker on the market at a price less than \$250; the Norton stacker did embody inventions covered by appellant's patents; beyond the damage that resulted from infringement, appellee's manufacture and sale of Norton stackers was injuring appellant in this wise: Before and after 1895 appellant had granted similar licenses to other makers; the validity of the patents had been universally recognized; on the patents appellant had built up a valuable property right in its system of licenses; appellee's conduct with respect to the infringing Norton stacker was demoralizing to the system, and, if persisted in, would destroy its integrity. In addition to an accounting, an injunction was prayed to restrain appellee from further making, using, or selling stackers in violation of appellant's rights

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as stated, or except in strict compliance with the terms of the license.

This is not a bill for the specific performance of a contract. The court is not asked to compel appellee to make and sell stackers under the license, and to see to it that appellee maintains the price, puts on the patent marks, and accurately reports its sales. So far as this bill is concerned, appellee may quit the stacker business any minute it sees fit. What is sought is an injunction against appellee's unlawful invasion of appellant's lawful patent monopoly. If appellee has not invaded, or if the monopoly is unlawful, appellant fails. If appellant had chosen to accept appellee's repudiation of the license, a bill to exclude appellee utterly from the domain of the patents would have lain. By declining to recognize the fact or the right of repudiation, appellant did not estop itself from asking to exclude appellee from that part of the domain which had not been granted, namely, the control of prices and methods. Stripped of all averments in relation to appellant's business built up on licenses, the bill states a good cause of action for infringement of the patents. These averments, as appellant rightly claims, show an aggravation of the injury resulting from the infringement, and constitute, therefore, an additional appeal for injunctive relief. That the bill properly invokes the aid of a court of equity, we have no doubt. *Eureka Co. v. Bailey*, 11 Wall. 488, 20 L. Ed. 209; *Kinsman v. Parkhurst*, 18 How. 289, 15 L. Ed. 385; *Hardin v. Boyd*, 113 U. S. 763, 5 Sup. Ct. 771, 28 L. Ed. 1141; *West[367]ern Union Tel. Co. v. Union Pac. Rld. Co.* (C. C.) 3 Fed. 423, 721; *McKay v. Smith* (C. C.) 29 Fed. 295; *Hat Sweat Mfg. Co. v. Porter* (C. C.) 34 Fed. 745; *Ball Glove Fastener Co. v. Ball & Socket Co.* (C. C.) 36 Fed. 309; *Am. Box. Mch. Co. v. Crossman* (C. C.) 57 Fed. 1021; *Id.*, 61 Fed. 888, 10 C. C. A. 146; *Heaton-Peninsular Co. v. Eureka Specialty Co.*, 77 Fed. 294, 25 C. C. A. 267, 35 L. R. A. 728; *Victor Talking Machine Co. v. The Fair*, 123 Fed. 424, 61 C. C. A. 58; *Rupp & Wittgenfeld Co. v. Elliott*, 131 Fed. 730, 65 C. C. A. 544.

As a reason why it should not be compelled to pay delinquent royalties on stackers confessedly made in accordance

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with the patents, appellee pleaded that appellant had itself first violated the license contract by extending to subsequent licensees more favorable terms than it granted to appellee. This partial defense we find to be unsupported by the evidence.

We dismiss without notice other partial defenses which are not established by the evidence, or which, if sustained by any proof, were not pleaded. *Rubber Co. v. Goodyear*, 9 Wall. 788, 793, 19 L. Ed. 566.

Answering the charge in relation to the Norton stacker, appellee denied that that stacker embodied any invention of any of appellant's patents. The validity of the patents was not questioned in the answer; but appellee, through its expert, brought into the evidence a very large number of prior patents with a view to limiting the claims relied on to less than their prima facie import. If this may not properly be taken as an admission that the Norton stacker infringes unless the claims be thus stripped of some of their apparent meaning, it nevertheless accords with the fact; for, in our judgment, the differences between the Norton stacker and the claims relied on, taking them as they read, are not even colorable enough to require discussion. So the question at this point is whether the prior art depreciates the face value of the claims.

The claims to be considered in the Buchanan patent, No. 467,476, January 19, 1892, are these:

"(1) The combination, in a pneumatic straw elevator and stacker, of the fan, the base portion C, and an upper portion D, hinged thereto, the adjacent ends of said two portions being fitted one within the other, whereby a sliding union is provided as the relative positions are changed, thus permitting one portion to be elevated relatively to the other while still maintaining a substantially air-tight relation between said two parts, substantially as set forth."

"(5) The combination, in a straw elevator and stacker, of the two portions C and D, united by a hinge or pivot, and a rope E, secured to the lower portion at one end, passing around the sheave on the upper portion, and returning to a windlass, also secured to the lower portion, substantially as shown and described.

"(6) The combination, with a pneumatic straw elevator and stacker, of a mouth portion hinged thereto, having an inclined upper side and an open under side, and means whereby said mouth portion may be adjusted to a desired position, substantially as set forth.

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"(7) The combination, with a pneumatic straw elevator and stacker, of a mouth portion D<sup>1</sup>, hinged thereto and adjustable thereon from a position substantially in line with the main portion of the stacker to a position at an angle therewith, whereby the direction the straw takes at the point of discharge may be controlled, substantially as shown and described."

"(9) The combination, with a threshing machine, of a pneumatic straw ele[368]vator and stacker attached thereto, as described, and a fan located within the machine and communicating with said straw elevator, said fan being arranged centrally of said machine and arranged to take its supply of air from the interior of the machine, thus drawing into itself the dust caused by the operation of said machine and discharging said dust into the straw, substantially as set forth."

Straw may be dumped into a heap and allowed to rot; or, if treated as a valuable product, it may be built into a compact, symmetrical stack, practically impervious to weather conditions, and thus preserved for future use. Prior to the advent of the Buchanan stacker, mechanical conveyors had carried the straw from the separator to the men who built the straw stack. So far as this record shows (and the whole world has apparently been ransacked to produce its bulky volumes), the patent of 1892 first disclosed a conception of means to free mankind from this most disagreeable and arduous manual task. Here was a new result, of the first order of importance. The utmost that any previous machine had done was to save the labor of getting the straw to the men who arranged it with their pitchforks and tramped it to solidity. This machine, with its fan for creating the blast that forces dust and straw out through an air-tight pipe; with its turntable joint at the base of the pipe, for lateral movement; with its substantially air-tight joint between the base and upper sections of the pipe, for vertical movement; with its adjustable mouthpiece at the outer end of the pipe, for controlling the direction and packing the blast-driven straw; with its appliances for giving universality of movement to the pipe and for directing the mouthpiece; all under the hand of a single operator—built straw stacks. The prior art is rich in fans, turntable joints, flexible pipe joints, air tight pipes, mouthpieces and nozzles, sheaves, ropes, and windlasses, used in many connections and for many purposes; but Buchanan never claimed that he was the creator



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of any of these. The record exhibits many mechanical conveyors. They did well their work of saving the labor of the men who pitched the straw from the ground to the men on the stack; but the immense trade in them has been totally lost to the higher-priced machine that relieves both the men on the ground and the men on the stack. The Brinsmead British patent, No. 218 of 1868, shows the combination of a fan and a pipe that is capable of being raised and lowered. That this was merely a pneumatic conveyor is sufficiently indicated by the pictures of the machine in operation, wherein a prominent feature is men on the stack with pitchforks in operation. The history of that machine has been traced. It never achieved success for its limited purpose, and long ago was numbered with the dead. Buchanan's patent No. 297,561, April 29, 1884, may prove that eight years before he reached the goal he perceived the benefits that would come from stacking straw pneumatically; but it shows clearly that he then lacked the conception of means to accomplish the desired result.

The claims are for combinations of admittedly old elements. The combinations were novel and useful, and involved unquestioned invention. The result was not merely new in degree; it was new in kind. Buchanan did not improve upon some one else's generic combination; he brought forth something theretofore nonexistent as certainly as [369] if he had produced a new element in the useful arts. Having evolved the conception of means to effect the new result, he found a variety of forms of the necessary elements from which to select, some alone and some in partial combination. The prior art evidence, without basis in the answer, therefore assails the inventiveness of the claims rather than their scope. But the act of the inventor consisted of picturing in the creative imagination the new result, the new machine for achieving it, and the way to build the machine, rather than of the selection and rearrangement of the elements of dredges or of grain elevators or of straw conveyers, for "form, location and sequence of elements are all immaterial, unless form or location or sequence is essential to the result, or indispensable, by reason of the state of the art, to the novelty of the claim." *Adam v. Folger*, 120

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Fed. 260, 56 C. C. A. 540, and cases cited. Against the pneumatic stacker of Buchanan's 1892 patent, the supplanted mechanical conveyors and the unsuccessful pneumatic conveyors are as nugatory as were the Hunt and Kelly barbed wires against the Glidden wire. *The Barbed Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 450, 36 L. Ed. 161; *Consolidated Safety Valve Co. v. Crosby Valve Co.*, 113 U. S. 157, 5 Sup. Ct. 513, 28 L. Ed. 939.

Little need be said of the other patents. They involve improvements upon one or another essential feature of the pneumatic stacker. Claims 1 and 2 of the first Nethery patent, No. 493,734, March 21, 1893, call for a fan positioned flatwise within or under the rear end of the separator, with its eye upward, and a hopper to guide the straw and dust into the eye of the fan. Claims 1 and 2 of the second Nethery patent, No. 517,475, April 3, 1894, provide a construction whereby the stacker may be more conveniently applied to a threshing machine already built, and means whereby the pipe, with its appliances for universal movement, may be mounted directly upon the turntable. Claim 1 of the first Landis patent, No. 512,553, January 9, 1894, exhibits a fan of the first Nethery patent, with a continuous web-plate to prevent the straw from coming into contact with the adjacent surfaces of the fan casing, thereby lessening friction and facilitating the discharge of the straw. Claim 2 of the second Landis patent, No. 514,266, February 6, 1894, discloses an improved mouthpiece whereby a greater range of distribution is afforded and the scattering of the straw by side winds is prevented. We find that the Buchanan patent of 1892 is dominant and the Nethery and Landis subordinate. But if the five be regarded as mere improvements upon the expired Brinsmead of 1868 and Buchanan of 1884, the fact that they are well adapted to conjoint use is established by appellee's way of making an up to date stacker.

The remaining matter in the answer is this: Appellee "submits" that its contract with appellant is a part of a license system which is violative of the Sherman Law, Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p.

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3200]. If this is a mere interrogatory propounded to the court, and not a joinder of issues of law or of fact or of both, appellee is not entitled to a further hearing. We will treat the submission, however, as taking issue with respect to the existence of a binding contract, and thus afford appellee a standing in court [370] while the question of the extent of the relief that should be granted to appellant is being considered.

Appellee is using the patents. Its answer that it has no license to do so does not meet the prayer that it be enjoined from using the patents except in accordance with the license. If there be no license, an injunction, even in the form prayed for, will prevent appellee from using the patents for the future. The answer of no license, however, does reach the question of damages for the past. One way, royalties; the other, profits, etc. Appellant demands royalties. And throughout the valid relationship of licensor and licensee, appellant has the right not only to royalties, but also to appellee's silence respecting the validity and prima facie scope of the patents. *Siemens-Halske Electric Co. v. Duncan Electric Mfg. Co.*, 142 Fed. 157, 73 C. C. A. 375.

Appellant (treating it as standing from the beginning in the shoes of the patentees) commenced to manufacture pneumatic stackers in 1891. The stacker had to be built into the separator. During 1891 36 stackers were built into 19 different makes of separators. In 1892 Gaar, Scott & Co., large manufacturers of threshing machinery, applied for license to build stackers into their own separators at their own factory. That license fixed the royalty at \$30 and the selling price at \$250, the same that appellant exacted from its own customers; provided that the licensee should be entitled to use all patents subsequently acquired by appellant, without additional royalty; and gave the licensee the benefit of any better terms that might subsequently be granted to others. By 1895 nearly all of the makers of threshing machinery had applied for and received, on the terms granted to Gaar, Scott & Co., licenses to build the stackers into their own separators at their own shops. Meantime appellant, at its own shops, continued

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to supply the demand for stackers to be built into old separators. Since 1895, the different makers being then willing to put stackers into old as well as into new separators, appellant has not been building stackers for the trade. As patents for improvements were issued from time to time appellant bought them up, in the main, until now it owns practically all of the patents that pertain to this art.

One attack upon appellant's license system is based upon the number of licensees. All the makers of threshing machinery have come into the system. That this resulted, without any concert of action on the part of the licensees, solely from a policy pursued by appellant through a course of years, is virtually admitted and is clearly proven. Appellant started out to supply the trade. That was its exclusive right. It committed no offense against the public in establishing the price at \$250. The public could not force it to license another to make its device. If it had stopped with the first license to Gaar, Scott & Co., appellee apparently concedes that the Sherman law would not have been violated. But have not the people been given something beyond their power to demand, in a policy that permits a customer to get a stacker as a part of the separator of his choice, not merely in connection with a favored separator? The contracts and the businesses of these licensees are separate. But if, as a condition of enjoying the inventions, appellant had required the licensees to form a pool or combination for controlling the price and output of the patent[371]ed article, the public would not have been injured, and consequently the Sherman law would not have been violated. *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.* (herewith decided) 154 Fed. 358.

Another attack is predicated upon the number of patents. The proposition is that the public is entitled to competition between independent inventions. The linotype and the monotype inventions are referred to as illustrating machines that produce the same result by essentially different means and modes of operation. If Buchanan had invented the linotype, the patent laws would have given him a monopoly, not a lesser right conditioned upon his giving the public the benefit

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of his invention in a way some chancellor might deem equitable (*Fuller v. Berger*, 120 Fed. 274, 56 C. C. A. 588, 65 L. R. A. 381, denying the doctrine of *Hoe v. Knap* [C. C.] 27 Fed. 204), but an absolute monopoly, an unqualified right to deprive the people of its use for 17 years (and the writ of injunction of course affords the only possible way) or to make them pay his price in the meantime. Would he by conferring upon the public the advantage of that disclosure be barred of the right to make or buy the monotype invention? We do not understand counsel for appellee to say "yes" squarely. But their contention comes to this: If he owned either alone, over that he would have complete dominion; owning both, he controls nothing. The public has no right in either invention; therefore the public has the right to have them both in the market competing for buyers. Naught plus naught; the sum of two naughts is a substantive quantity.

If we are mistaken in our view of the prior art and in attributing primacy to the Buchanan patent of 1892; if the foundation patent be either the Brinsmead of 1868 or the Buchanan of 1884; and if the patents in suit be only for independent improvements upon a successful stacker that was free to the public—the argument of counsel respecting the lawfulness of the concentration of the patents in the hands of a single company is covered fully by the opinion of the Supreme Court in *United States v. American Bell Telephone Co.*, 167 U. S. 224, 17 Sup. Ct. 809, 42 L. Ed. 144. With a quotation from that, the analogies being noted in parentheses, we close:

"Much is said in the briefs and in the arguments about the practical continuance of the telephone (stacker) monopoly. It is well to understand exactly what is meant thereby. No one questions that the Bell patent (the Brinsmead or the Buchanan of 1884) has expired, and that all of his invention is free to the use of the public. It is not denied that Berliner's invention (Buchanan's of 1892) is something independent and distinct from the Bell (Brinsmead) invention. It is the combination of these inventions (the Brinsmead, the Buchanan of 1884, and the Buchanan of 1892) with those of Blake and Edison (Nethery and Landis) which makes the instrument in commercial use, and because this is the most serviceable it is the one that the public insists upon having. But each invention has independent rights. It loses nothing because when united with another

Grosscup, J., concurring.

It results in an instrument more valuable than either alone will give. Suppose that at the expiration of this Berliner (Buchanan 1892) patent some new invention shall be made by which in connection with those already free to the public an instrument can be manufactured far surpassing in utility that used today, and the Bell Company (appellant) shall purchase that invention; the public, which always insists on having the best and most serviceable, will undoubtedly take the new instrument, and in that way it may happen that what is called the telephone (stacker) monopoly is practically still further continued. But surely that does not abridge the legal rights of any one. [372] The inventor of the latest addition is entitled to full protection, and if the telephone company (appellant) buys that invention it is entitled to all the rights which the inventor had. All that the patent law requires is that when a patent expires the invention covered by that patent shall be free to every one, and not that the public has the right to the use of any other invention, the patent for which has not expired, and which adds to the utility and advantage of the instrument made as the result of the combined inventions."

The decree is reversed with the direction to enter a decree in appellant's favor in accordance with the prayer of the bill.

GROSSCUP, Circuit Judge (concurring).

The ground on which I wish to put my concurrence, so far as the case involves the Sherman Act, is this: The Buchanan patent is a true combination patent, of which the Nethery and Landis patents are improvements only, and subsidiary thereto—so much so that they could not have been put into practice except by infringement of the Buchanan patent. The patents as an entirety, therefore, constitute a single mechanical evolution—are blossoms from the same trunk—and in no sense are competitive patents; from which it follows that their concentration in one control is in no sense a combination to prevent competition. I state this as my view because I am not prepared to hold—as I have said already in a concurring opinion in *Rubber Tire Wheel Company v. Milwaukee Rubber Works Company*—that patented articles are never, under any circumstances, articles of trade or commerce, within the Sherman act.

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**[869] BIGELOW v. CALUMET & HECLA MINING CO.  
ET AL.\***

(Circuit Court, W. D. Michigan, N. D. April 12, 1907.)

[155 Fed. Rep. 869.]

**MONOPOLIES—CONTROL OF COMPETING CORPORATION.**—The control by one mining corporation organized under the laws of Michigan of another similar corporation engaged in a competing business in interstate and foreign commerce by acquiring a majority of its stock, or in part by acquiring stock and in part by soliciting and obtaining proxies from other stockholders with the purpose and intention of eliminating competition and obtaining a monopoly of trade in their products, either complete or partial, is in violation of the federal anti-trust law (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), which makes unlawful every combination in restraint of interstate or foreign trade and commerce, and also of Pub. Acts Mich. 1899, p. 409, No. 255, as supplemented by Pub. Acts Mich. 1905, p. 507, No. 329, prohibiting all combinations entered into for the purpose and with the intent of establishing and maintaining a monopoly; nor is such transaction relieved from its invalidity under the latter statute by Pub. Acts Mich. 1905, pp. 153, 154, No. 105, which authorizes mining corporations of the state to purchase and own stock in other similar corporations.<sup>b</sup>

**SAME—FEDERAL ANTI-TRUST STATUTE—SUIT FOR INJUNCTION.**—A private party, who has sustained special injury by a violation of the federal anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), may sue in a federal court for injunction under the general equity jurisdiction of the court, where, by reason of diversity of citizenship of the parties, the court has jurisdiction of the suit.

**CORPORATIONS—SUIT BY STOCKHOLDER—CONDITIONS PRECEDENT.**—A stockholder of a corporation may sue in a federal court to restrain another corporation which has obtained control of a majority of its stock from voting the same for the purpose of electing its own directors and eliminating competition between the two companies in alleged violation of law and to the irreparable injury of complainant as a stockholder, although the bill does not show a formal demand upon the directors to bring the suit as provided by equity rule 94, even conceding that the right of action is in fact that of the corporation, where the allegations prima facie negative collusion and fairly show that such demand would have been unavailing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 791-795.]

\* See also 167 Fed. Rep., 704. *Post*, p. 593. See also 167 Fed. Rep., 721. *Post*, p. 618.

<sup>b</sup> Syllabus copyrighted, 1907, by West Publishing Co.

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**INJUNCTION—SPECIAL INJURY TO COMPLAINANT.**—A bill by a stockholder of a corporation, who is also an officer and director to enjoin the voting of stock by another corporation for the alleged purpose of changing the management in its own interest and creating an illegal monopoly to the detriment of the minority stockholders, shows such a special interest in complainant as distinct from the public and such threatened irreparable injury to his rights as to justify the granting of a preliminary injunction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 305, 306.]

**SAME—PRELIMINARY INJUNCTION—GROUNDS.**—The bill of a stockholder and supporting affidavits *held* to make a showing which entitled him to a preliminary injunction to restrain defendant from voting stock to change the officers and management of the corporation pending a hearing on the merits.

In Equity. On application for preliminary injunction.

*Angell, Boynton, McMillan and Bodman and Taggart, Denison and Wilson*, for complainant.

*Otto Kirchner, Chadbourne and Rees, and Butterfield and Keeney*, for defendant Calumet & Hecla Mining Company.

[870] KNAPPEN, District Judge.

The complainant is a citizen of Massachusetts. The defendants, hereafter called, respectively, the Calumet & Hecla Company and the Osceola Company, are corporations organized under the Michigan mining law, and engaged in the manufacture and sale of copper. The complainant, who is the president of, and a substantial stockholder in, the Osceola Company, filed his bill on the 12th day of March, 1907, for the purpose of obtaining injunction, both temporary and permanent, restraining the Calumet & Hecla Company from voting at the annual stockholders' meeting of the Osceola Company (then appointed to be held on March 14, 1907) a large block of Osceola Company stock held by the Calumet & Hecla Company, as well as proxies for a large amount of other of such stock held by that company, upon the ground that the action of the Calumet & Hecla Company in buying and obtaining proxies for such stock constitutes an attempt to establish and maintain a monopoly of the business of mining, smelting, refining, and selling copper, contrary to the Sherman Anti-Trust Act, the Michigan anti-monopoly law, and



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common-law obligations. Upon the filing of the bill, an order was issued restraining the voting of such stock in advance of the hearing of the application for temporary injunction, except to the extent of adjourning the annual meeting. Hearing upon the application for temporary injunction has been had upon the bill, answer, and testimony by way of *ex parte* affidavits filed on both sides.

The Calumet & Hecla Company was organized in 1871, and capitalized at \$2,500,000, only \$1,200,000 of which has been paid in. Its operation has been highly profitable; the market value of its stock being now about \$90,000,000. The Osceola Company is capitalized at \$2,403,750. It likewise has been profitably operated, having for the past 20 years (except in 1903) paid dividends without interruption; those paid in 1906 aggregating 64 per cent. of the par value of the stock, whose market value is now nearly six times the par value. The two mining companies are in active competition with each other in the production and sale of copper throughout the United States and foreign countries; the mining operations of both being carried on in the upper peninsula of Michigan.

Until 1905, companies organized under the Michigan mining law had no power to own stock in other mining companies in this state, although for many years they had been authorized to own stock in companies outside the state. 2 Comp. Laws Mich. 1897, § 7012. In 1903, mining companies were given authority to hold stock in companies formed under the Michigan mining law or under any other laws for refining, smelting, or manufacturing ores, minerals, or metals. Pub. Acts Mich. 1903, pp. 382, 383, No. 233. In 1905, corporations organized under the Michigan mining law were empowered to "subscribe for, purchase, own and dispose of stock in any company organized under this act, or under any other laws, foreign or domestic, for the purpose of mining, refining, smelting or manufacturing any or all kinds of ores or minerals." Pub. Acts Mich. 1905, No. 105, pp. 153, 154.

The testimony tends to show that Michigan copper, which is known commercially as "lake copper," is of a different quality from that produced elsewhere in the United States,

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having superior tensile and torsional strength, ductility, and conductivity, usually bringing in the market a slightly higher price than other copper; that the best grade of lake copper, called in the bill "prime lake copper," has thus far been produced only by five companies, in the following amounts annually, Calumet & Hecla 100,000,000 pounds, Osceola 18,000,000, Quincy 18,000,000, Tamarack 10,000,000, and Wolverine 10,000,000; the Calumet & Hecla Company thus producing over 75 per cent. of the aggregate—defendants' testimony tending to show that at least five other Michigan mines are producing copper, aggregating over 11,000,000 pounds annually, which rightly treated would be equally good. It is undisputed that for certain purposes lake copper is preferable to any other copper, and the testimony tends to show that the United States government, in its purchases of unmixed copper for the manufacture of cartridge cases, buys only lake copper, and thus far has specified only Calumet & Hecla, Osceola, Quincy, and Tamarack. It is undisputed that of the 1,000,000,000 pounds of copper produced annually in the United States (which is considerably more than produced in all other countries) lake copper constitutes one-quarter or one-fifth, about one-half of which amount is produced by the Calumet & Hecla Company. The testimony tends further to show that since the 1905 amendment to the Michigan mining law the Calumet & Hecla Company has embarked upon a pronounced policy of expansion; that it has expended from \$2,000,000 to \$3,000,000 in exploring mines on lands of other companies, and several million dollars in the purchase of stocks in competing mining companies, and that it has taken options on stocks of other mining companies. The companies in which such interests have lately been acquired include the Centennial, Allouez, La Salle, Gratiot, Manitou, Frontenac, Superior, and others, some of which mines are now competitive and productive, others of which are still in the exploratory stage; the Calumet & Hecla Company owning in most of these companies a majority interest, and in one or more cases the entire. As a part of this policy of expansion, the Calumet & Hecla Company has increased its own land holdings from about 2,700

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acres to about 50,000 acres; the land holdings of the companies in which interests have been acquired bringing the aggregate holdings of land to above 70,000 acres. The testimony further tends to show that within a few months before the date fixed for the 1907 annual meeting of the Osceola Company the Calumet & Hecla Company quietly bought up a large amount of Osceola stock; the management of the Osceola Company knowing nothing of such purchase until February 20 (22 days before the proposed annual meeting), on which date 20,000 shares were transferred to the Calumet & Hecla Company on the books of the Osceola Company, and the Calumet & Hecla Company also being the owner of additional holdings not of record, the amount of which is not shown, except that the answer of the defendant says that its holdings are less than a majority, which majority would be about 48,000 shares. On February 21, 1907, the Calumet & Hecla Company sent, in its own name, to all the stockholders of the Osceola Company whose names and addresses it could learn, a circular letter in which the Calumet & Hecla Company, "as the largest stockholder of the Osceola Consolidated Mining Company," asked that all Osceola stockholders who should be willing to [872] intrust the management of the company to a board of directors "the majority of whom should be selected" from a list given in the letter (who in fact were representatives of the Calumet & Hecla Company) appoint as their proxies three Calumet & Hecla representatives named therein, one of whom is the vice president of that company. The testimony tends to show that on the same 21st day of February the Calumet & Hecla Company wrote to complainant, as president of the Osceola Company, a letter stating that the Calumet & Hecla Company had become the largest shareholder of record in the Osceola Company, and expected to "elect a majority of the directors at its annual meeting, March 14, next," and requesting that until such election no contract be entered into by the president, directors, or agents of the Osceola Company which by its terms was not to be performed entirely during the term of the present board of directors (which would naturally then extend but a few weeks longer), especially contracts for the

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sale of its copper products or for the purchase of coal, contracts with railways and mills, for the sale of lands or for the location of mills. The manifest purpose of the Calumet & Hecla Company in sending this letter was to prevent the Osceola Company from entering into any contracts, or assuming any obligations, which could conflict with the management of the Osceola Company by the Calumet & Hecla Company in case the latter should secure such expected control. The case presented fairly tends to show that the Calumet & Hecla Company bought its holdings of Osceola stock, and procured the proxies referred to, with the intention, if possible, of thereby controlling the management of this competing company, with which it had previously no connection by way of stock ownership or otherwise, and of turning out the present management of the Osceola Company; that it would have bought a controlling interest had such interest been readily acquirable on satisfactory terms; and that it has obtained enough proxies, together with its own stock holdings, to elect a controlling majority of the board of directors of the Osceola Company, and at the time the bill was filed was intending to so vote such shares and to so act.

The Kearsarge lode runs through the mines of the Calumet & Hecla, Osceola, Centennial, Allouez, La Salle, and Gratiot. The testimony tends to show that the Calumet & Hecla Company proposes by combining the Osceola with its other holdings to operate that company, the Calumet & Hecla, Centennial, Allouez, and possibly other mines, by sinking through Osceola lands shafts for other mines, shafts for the Osceola through the lands of other companies, and using for some or all of these mines on the lode drifts or openings from the lands of other mines, using machinery in common to some extent for two or more of such mines, including the Osceola, and having ores from all these mines stamped, smelted, refined, and sold through Calumet & Hecla agencies; that the Osceola's product is now, and for a long time has been, sold through the United Metals Selling Company, with which the Calumet & Hecla is not in sympathy; that the Osceola, in connection with two other mines, owns a smelter and is interested in a chemical company, the

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use of both of which the Calumet & Hecla Company proposes to dispense with. Complainant's affidavits tend to show that such proposed change of policy and management, including such proposed interuse of shafts, drifts, and machinery, would be injurious to the interests of the Osceola and its stockholders, through the increased danger of fire, peril to life, and otherwise; that the management of the Calumet & Hecla Company has been, and is, extravagant, and it is only by reason of the phenomenal richness of its ores that its management has been profitable; that the alleged extravagant management of the Calumet & Hecla Company applied to the Osceola ores would render the operation of the latter company unprofitable, would depress stock values, and would greatly injure complainant and other minority stockholders in the Osceola Company. Complainant's testimony further tends to show that the control of the copper output of the mines of Michigan would establish an absolute and complete monopoly in the production of the best grades of copper, independently of the ownership of any mines now in operation within the United States or elsewhere, and would permit the raising of the price of such copper; that the control of the Calumet & Hecla and the Osceola mines by one corporation will tend to create a practical monopoly in the supply of such copper so used and would eliminate all competitive bidding as between the two companies, thus creating a monopoly in the supply of such copper; that such control of the Osceola Company by the Calumet & Hecla Company would result in at least a partial monopoly in prime lake copper; that the acquisition of the Tamarack and Quincy mines would make such monopoly complete; and that the effect of the control of the Osceola Company by the Calumet & Hecla Company would of itself enable the latter to raise the price of prime lake copper.

The bill alleges that lake copper is used in all branches of the arts in enormous quantities, and is used and sold outside the state of Michigan, being delivered by the companies producing it to all parts of this and foreign countries; that the Osceola Company is in active competition with the Calumet & Hecla Company in producing and selling such copper

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throughout the United States and in foreign countries; that each of said companies is engaged in interstate and foreign commerce; that the action of the Calumet & Hecla Company in so attempting to secure control of the Osceola Company, including the election of its board of directors, is a part of the general plan of the Calumet & Hecla Company to secure control of practically the entire output of lake copper, and thereby secure a complete and absolute monopoly of the product of such copper throughout the United States, and especially of such prime lake copper; and that such purchase of stock and procurement of proxies are ultra vires and confer no authority upon the Calumet & Hecla Company to vote the same.

The defendant, both by answer and affidavits, disputes many of complainant's allegations of fact, expressly denying that it is intending or attempting to obtain a monopoly or control either of prime lake copper or of lake copper generally, and denying that its control of the Osceola Company would or could accomplish such monopoly, complete or partial. It disclaims any intention to operate the Osceola Company to the injury of the minority stockholders; alleges that the majority of the stockholders of that company are dissatisfied with the present management, and that it intends to make the operation [874] of the Osceola Company's property more profitable to the latter's stockholders than heretofore. It submits that the acts complained of do not offend against either the federal Anti-Trust Act, the Michigan anti-monopoly act, or common-law equity principles; that if the acts complained of are unlawful the remedy by injunction may be invoked only by the Attorney General of the United States, or the Attorney General or prosecuting attorneys of the state of Michigan; that, if such injunctive relief may be given to a private party, it can be given only to the Osceola Company; that complainant, as a minority stockholder, has shown no right to act on behalf of the corporation; that no peculiar injury to complainant, actual or threatened, is alleged; and that, upon the face of the testimony presented, an injunction in advance of final hearing would be an unwarranted divesting of property rights and an unwarranted disturbing of the existing status.

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1. The bill plainly alleges a violation of law, unless the transaction complained of is made lawful by the fact that the alleged attempted monopoly is proposed to be accomplished by means of a control of stock in a competing company, rather than by direct previous agreement between the two companies. The allegation is, in substance, that the stock has been purchased, and the proxies obtained, for the purpose of suppressing competition between two otherwise competing companies, and that the proposed control will in fact enable the creation of a monopoly. The formation of a monopoly for the purpose of suppressing trade or commerce is unlawful, both at common law (*Richardson v. Buhl*, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457; *Hunt v. Riverside Co-operative Club*, 140 Mich. 548, 104 N. W. 40, 112 Am. St. Rep. 420; *Chesapeake & Ohio Fuel Co. v. U. S.*, 115 Fed. 610, 53 C. C. A. 256), and under both the federal and state anti-trust laws. The federal act provides that every combination in restraint of trade or commerce is illegal. Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]. As said by Judge (now Justice) Day, in *Chesapeake & Ohio Fuel Co. v. U. S.*, 115 Fed. 619, 53 C. C. A. 265: "All contracts and combinations are declared illegal if in restraint of trade or commerce among the states." Under the Michigan statute, a trust is a "combination of capital, skill or arts by two or more persons, firms, partnerships, corporations or associations of persons, \* \* \* (3) to prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity," and it is declared to be unlawful, against public policy, and void for two or more persons or corporations to "pool, combine, or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected." Pub. Acts Mich. 1899, p. 409, No. 255. The supplementary and declaratory act of 1905 provides that:

"All combinations of persons, partnerships or corporations made or entered into for the purpose and with the intent of establishing and maintaining, or of attempting to establish or maintain, a monopoly of any trade, pursuit, avocation, profession or business, are hereby declared to be against public policy, illegal and void." Pub. Acts Mich. 1905, p. 507, No. 329.

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[875] It is not necessary under either the federal or state statutes that a complete monopoly be effected. It is sufficient if it tends to that end, and to deprive the public of the advantages which flow from free competition. *U. S. v. E. C. Knight Co.*, 156 U. S. 16, 15 Sup. Ct. 249, 39 L. Ed. 325; *Northern Securities Co. v. U. S.*, 193 U. S. 332, 24 Sup. Ct. 436, 48 L. Ed. 679; *Hunt v. Riverside Co-operative Club*, 140 Mich. 547, 104 N. W. 40, 112 Am. St. Rep. 420. The above-quoted language of both the federal and state statutes is in terms broad enough to cover any means purposely adopted for, and manifestly adapted to, the accomplishment of the unlawful purposes. It seems clear that, under the decision in *Northern Securities Co. v. U. S.*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, the creation of a monopoly by way of stock purchase and control offends against the statute. In that case, at page 331 of 193 U. S., and page 454 of 24 Sup. Ct. [48 L. Ed. 679], it is said:

"It (the Sherman Anti-Trust Act) does embrace and declare to be illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be the parties to it, which directly or necessarily operates in restraint of trade or commerce among the several States, or with foreign nations."

The distinction recognized in *Davis v. A. Booth & Co.*, 131 Fed. 31, 65 C. C. A. 269, and in *Northern Securities Co. v. U. S.*, between cases of outright purchase of the entire property of the absorbed company, and cases of combination of owners and property under one management, where each owner's interest is continued in the combination, would seem to place a combination by way of stock purchase and stock proxies within the prohibition of the statute. In the late case of *Dunbar v. American Tel. & Tel. Co.*, 79 N. E. 427, 224 Ill. 9, the Supreme Court of Illinois has directly held that, where a corporation purchased the majority of the stock of another corporation, it is sufficient to condemn the transaction as unlawful, if its tendency is to restrain competition. This principle is impliedly recognized in *Clark & Marshall on Private Corporations*, § 652 (14). Nor can the fact that the alleged monopoly is proposed to be affected in part by the holding of proxies relieve an otherwise unlawful



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transaction of its unlawful character. If the object of obtaining the proxies was, as alleged, to create a monopoly, it is within the manifest prohibition of the law. The identity of the two corporations is maintained, and the combination is as effective as if a lease of the corporate property had been given.

The fact that the Michigan mining statute of 1905 gave the Calumet & Hecla Company power to purchase and own stocks in other mining corporations is invoked as making lawful the monopolistic control obtained through such purchase. The proposition is, in other words, that the Michigan statute gives the right to do the act complained of. Pub. Acts Mich. 1905, p. 153, No. 105. But this statute must be read in connection with the avowed policy of the state as expressed by its statutes. *Distilling & Cattle Feeding Co. v. People*, 156 Ill. 491, 41 N. E. 188, 47 Am. St. Rep. 200. When the amendment above referred to was passed, the statute of 1899, above referred to, was in force. The same legislature which passed the mining amendment of 1905 [876] later passed act No. 329, p. 508, acts 1905, "supplementary to, and declaratory of," the anti-monopoly act of 1899, containing the express provision before quoted, and in addition thereto exceptionally drastic provisions designed to prevent monopolies, total or partial, by whatever means accomplished. The result of these two statutes is that power was given to the Calumet & Hecla Company to purchase stock in the Osceola Company, but the right to exercise that power in violation of the anti-monopoly statutes of the state was not given. For the reasons stated, the conclusion reached is that the bill sufficiently alleges an unlawful combination.

2. The question whether a bill for injunctive relief can be maintained under the federal Anti-Trust Act at the instance of a private party is not free from difficulty. It is strenuously contended that under neither the federal Anti-Trust Act nor the State act can relief by way of injunction be granted to a private party; that section 4 of the federal act, which provides for injunctive relief, is expressly limited to suits brought at the instance of the Attorney General; and that section 7 of the federal act, giving to an injured party a

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right of action at law for treble damages, considered in connection with section 4 referred to, by necessary implication excludes the right of a private party to maintain any suit except that for treble damages under section 7, regardless of the general equitable jurisdiction of the court. Some of the cases cited affirm this contention. Others of them, in my judgment, do not, but, on the contrary, recognize the rule that the prohibition against injunctive relief under the federal act is limited to suits brought for injuries common to the general public, and that under the general jurisdiction of equity relief may be granted to a private party against violations of the Anti-Trust Act.

In *Blindell v. Hagan* (C. C.) 54 Fed. 40, and *Id.*, 56 Fed. 696, 6 C. C. A. 86, relief was asked, first, under the federal Anti-Trust Act; and, second, under the general equity jurisdiction of the court. The district judge held that no one but the Attorney General could file a bill under the Anti-Trust Act, but that, as the court had jurisdiction of the case by reason of diverse citizenship of the parties, it could grant relief upon the grounds of inadequacy of legal remedy and the prevention of multiplicity of suits. The relief granted was given none the less on account of the unlawful combination in restraint of trade.

In *Pidcock v. Harrington* (C. C.) 64 Fed. 821, complainant expressly disclaimed any right to relief under the general equity principles of the common law, and planted himself solely on the Sherman Act. The district judge sustained a demurrer to the bill. The decision was not reviewed. It does not appear that there was diverse citizenship of the parties, and thus that the court would have had jurisdiction of the case but for the federal question.

In *Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co.*, 86 Fed. 407, 30 C. C. A. 142, it was held that no case was stated under either the federal Anti-Trust Act or the common law; but it was said:

"We do not doubt the general jurisdiction of the Circuit Court as a court of equity to afford preventive relief, in a proper case, against threatened injury about to result to an individual, for any unlawful agreement, combination or conspiracy in restraint of trade."

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[877] In *So. Ind. Exp. Co. v. U. S. Exp. Co.* (C. C.) 88 Fed. 659, and *Id.*, 92 Fed. 1022, 35 C. C. A. 172, heard on demurrer to bill, the acts complained of were entirely lawful unless by reason of the federal Anti-Trust Act. It was held that under that law a private party could not obtain relief by bill in equity. It does not appear that the court had jurisdiction by reason of diverse citizenship.

In *Metcalf v. American School Furn. Co.* (C. C.) 108 Fed. 909, and *Id.*, 113 Fed. 1020, 51 C. C. A. 599, heard on motion for temporary injunction and on demurrer to the bill, complainant sought, first, relief against the monopoly created by the absorption of the Buffalo Company by the American School Furniture Company, and, second, the assessment and collection in the equity suit of the treble damages given by the seventh section of the federal Anti-Trust Act. The district judge held that these damages were recoverable only in an action at law for the sole benefit of the complainant, while the equitable relief was for the benefit of all interested in the corporation, and that the bill was thus multifarious. The right to equitable relief was not, however, denied, but expressly affirmed. After the bill had been amended by eliminating the demand for treble damages, and upon hearing upon demurrers and pleas to the amended bill ([C. C.] 122 Fed. 115), the district judge held that the bill presented no case except under the federal anti-trust law, and that under that law suit for injunctive relief could be brought only at the instance of the Attorney General. This decision has not been reviewed.

While the decisions referred to are entitled to great respect, they do not commend themselves to my judgment so far as they deny the right of a private party, who has sustained special injury by the violation of the Anti-Trust Act, to relief by injunction under the general equity jurisdiction of the court. As already seen, the cases referred to do not generally announce such rule.

The case of *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 70, 72, 24 Sup. Ct. 598, 48 L. Ed. 870, does not, to my mind, assert the rule contended for by defendant. On the contrary, it seems to recognize by implication a contrary rule.

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In that case, which was decided since the decisions in all the cases referred to above, the State sought relief under both the Minnesota statute and the federal Anti-Trust Act. It was held that relief could not be given under the Minnesota statute for lack of diverse citizenship of the parties, nor under the federal statute because the injury alleged to have been sustained by the State was not direct or special, but only "remote and indirect; such an injury as would come alike, although in different degrees, to every individual owner of property in a State by reason of the suppression, in violation of the act of Congress, of free competition between interstate carriers engaged in business in such State; not such a direct, actual injury as that provided for in the seventh section of the statute." It was accordingly merely held (so far as right to relief under the federal Anti-Trust Act is concerned) that the intention of the statute was "to limit direct proceedings in equity to prevent and restrain such violations of the Anti-Trust Act as cause injury to the general public, or to all alike, merely from the suppression of competition in trade and commerce among the several States and with foreign nations, to those in[878]stituted in the name of the United States under the fourth section of the act, by district attorneys of the United States, acting under the direction of the Attorney General."

I can not overlook the fact that the federal Anti-Trust Act is highly remedial. Its apparent object is not to restrict, but to extend, remedies. The seventh section gives the Circuit Courts jurisdiction without respect to the amount in controversy, allows threefold damages and the costs of suit, including a reasonable attorney's fee. The very penal provisions invoked by defendant's counsel as requiring a strict construction of the act are but evidence of the highly remedial nature of the statute, and I am loath to conclude that a statute of this nature should be construed as taking away the otherwise existing jurisdiction of equity to afford relief. In this case jurisdiction is conferred by the diverse citizenship of the parties.

The case of *In re Lennon*, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110, is not without pertinency. It was there held (under habeas corpus proceedings alleging lack of jurisdic-

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tion) that a bill in equity was properly filed by one railroad company against other railroad companies under the Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], to restrain the refusal to afford equal facilities to the connecting line, as exhibiting a case arising under the laws of the United States, namely, the Interstate Commerce Act. The court there said (page 554 of 166 U. S. and page 660 of 17 Sup. Ct. [41 L. Ed. 1110]):

"Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim, or protection, or defense of the party, in whole or in part, by whom they are asserted."

It is noticeable that the act there in question expressly provided for relief to the injured person either by suit against the offending carrier or through complaint to the commission (sections 8 and 9), but not for injunction, except under circumstances not existing, and by methods not employed in the suit in question.

The bill alleges that the complainant's remedy at law is inadequate, and it may well be. It is fairly inferable from the case presented that, if the control of the Osceola Company by the Calumet & Hecla Company is had, a complete revolution in the management and in the method of operation of the former company will take place. To prove damages as resulting from such a combination, in view of the complete change of methods intended, and under an entirely new management, may well be difficult. The reasons for such difficulty seem too apparent to require elaboration. The Michigan statute, however (Pub. Acts Mich. 1899, p. 409, No. 255), contains no express provision for injunction suits by the district attorney or prosecuting attorneys, although "for a violation of any of the provisions of the act" it authorizes the institution of "proper suits or quo warranto proceedings in a court of competent jurisdiction," which is recognized as giving authority to maintain injunction suits to restrain violations of the Anti-Trust Law. *Hunt v. Riverside Co-operative Club*, supra. It is therefore not necessarily subject to the same considerations as the federal statute.

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[879] In my opinion, under the case here presented, the objection that remedy by injunction cannot be afforded at the instance of the injured party should not be sustained.

It is contended that under the case made by the bill the grievance complained of is that of the Osceola Company, and that complainant, as a stockholder in that company, has not complied with general equity rule No. 94, adopted to prevent a collusive conferring of jurisdiction. The authorities agree that, where the relief is sought for the benefit of the corporation, the complaining stockholder must show that he has exhausted all means within his reach to induce the corporation to take action, to the extent of formally making demand for action upon the board of directors (and, as held in some cases, even upon the stockholders), unless it appears that such demand would be an idle ceremony. It is clear that such demand upon the stockholders would have been, in this case, an idle ceremony, as a majority of the stock is apparently controlled by the Calumet & Hecla Company. Moreover, but 22 days intervened between February 20 and March 14, and the mining law required four weeks' publication of notice for special stockholders' meeting. 2 Comp. Laws Mich. 1897, § 6999. The bill alleges that the suit is not collusive; that complainant had consulted with a majority of the directors, all of whom expressed their opinion that the corporation should not bring the suit, in view of the antagonism thereto on the part of the majority of the stockholders, and in view of the near expiration of their terms as directors. Assuming that the relief asked for belongs to the corporation, the question is: Does the bill show that demand upon the directors to bring the suit would be an idle ceremony? This hearing is not upon demurrer to the bill, but upon answer and affidavits. There is force in the suggestion that the directors might properly be adverse to taking corporate action under the circumstances stated, and that under the allegations referred to there is as much ground for an inference that the board, if formally called together, would have declined to take corporate action, as in a case where individual directors are known to favor the situation complained of. The allegations prima facie negative collusion. If upon

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final hearing the jurisdiction of this court should be found to rest upon collusion, the bill would be then dismissed. The fact that the original bill did not allege compliance with rule 94 is not material. The amended bill was filed as a matter of right. On this hearing relief can be given on the amended bill with the same effect as if it were an original bill.

It is not clear, however, that the grievance complained of belongs solely to the corporation. An action at law for the recovery of damages on account of the acts sought to be enjoined would accrue to individual stockholders, under section 7 of the federal act and the eleventh section of the Michigan statute. *Metcalf v. American School Furn. Co.* (C. C.) 108 Fed. 909, 912; s. c. (C. C.) 122 Fed. 115, 116. The right of the complainant to maintain the bill for his personal interest is recognized by respectable authorities. High on Injunctions (4th Ed.) § 1227, and cases cited; *Dunbar v. American Tel. & Tel. Co.*, 79 N. E. 423, 224 Ill. 9. If the Osceola Company was not a necessary party, and the bill is maintainable upon general equity principles, this court would have jurisdiction through diversity of citizenship, and thus the case would not be within the mischief aimed at by the rule in question.

4. It is contended that the bill does not allege a threatened, direct injury to complainant from the proposed monopoly charged, beyond such injury as would be suffered by the general public, and that irreparable injury is not sufficiently alleged to justify injunction. The seventeenth paragraph of the bill alleges that if the Calumet & Hecla Company shall secure the intended control of the Osceola Company it will be able to, and will, control the Osceola Company in its own interests, and not in the interests of complainant and other stockholders similarly situated; that the officers of the Osceola Company will have no independence of action in the management of that company's affairs; and that thereby complainant and other stockholders will suffer great loss and damage. As before said, this hearing is not on demurrer to the bill. The paragraph in question must be construed in connection with the other paragraphs of the bill and the

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case presented upon this application. The bill alleges that the complainant is director and officer of the Osceola Company, and defendant's affidavits allege that he receives a substantial salary. It is alleged that the Calumet & Hecla Company proposes to oust the present directors, including the complainant, as a director and officer. Complainant's affidavits tend to show that the Calumet & Hecla Company proposes to revolutionize the method of operation of the Osceola mine, both in mining, manufacturing, and selling, and in the interuse of shafts, drifts, and openings, and that the proposed methods, if applied, will injure the value of complainant's stock. Surely injuries such as these are distinct from such as would be suffered by the general public through the creation of a monopoly, and are injurious not only to the corporation as an entity, but to the individual stockholders. Moreover, under the anti-trust laws, if an unlawful monopoly is created, the Osceola Company would be subject not only to fine, but to forfeiture of franchises, notwithstanding the monopoly is created by action of the stockholders rather than by corporate action. *Clark & Marshall on Private Corporations*, § 314 (R). These injuries likewise are distinct from those suffered by the general public. If the injuries referred to shall be suffered by complainant, they are properly termed irreparable. *High on Injunctions* (4th Ed.) § 1227, and cases cited.

5. It is urged that the case made by complainant's bill and affidavits is fully met by defendant's answer and affidavits; that it is clearly shown that no combination in restraint of trade is actually threatened, or is possible; that this suit is a mere attempt on the part of minority stockholders to maintain themselves in power; that complainant and his associates are shown to have abused their trusts; that the proposed action sought to be restrained is in the best interest of the Osceola Company and its stockholders; that the injunction should be denied for these reasons, and for the further reason that it would violate the fundamental rule which forbids the disturbing, by injunction, of vested rights and existing status. In this connection, the apparent fact that the Calumet & Hecla Company bought its Osceola stock not



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merely for investment, but for the purpose of intervening in the management of the affairs of a competing company, is worthy of consideration. The fact that the answer completely denies the equity of the bill does not require a refusal of the injunction, nor should the court upon this hearing, and from affidavits, determine litigated questions of fact. It may be that upon the final hearing it must be held that complainant's case is completely overthrown. It is apparent, however, that if complainant shall sustain, on final hearing, the case presented by his bill, he is entitled to relief, unless it shall be found that the right belongs to some one other than complainant. The court is not to be understood as expressing an opinion upon the merits. It is sufficient for the purposes of this hearing that the court be convinced that upon the pleadings and upon the evidence a case is presented which makes the transaction a proper subject of investigation in a court of equity; or, otherwise stated, that complainant has a fair question to raise as to the existence of such right. It is in this view that the testimony favorable to complainant's case has been so fully set out. The court cannot say upon this application that complainant may not prevail upon final hearing, but is convinced that a fair question is raised as to the existence of the right asserted, and that opportunity should be given for a final decision upon the difficult questions of law and fact involved. Such being the case, the injunction should not be refused unless upon the balancing of convenience and inconvenience, to the one party or the other, an injunction appears inexpedient.

Upon such balancing, the considerations in favor of the injunction preponderate. If the injunction is not issued, the office of this suit is practically ended. On the other hand, if the injunction issues, the worst that can happen to the Calumet & Hecla Company is a continuance, until final hearing, of the present management, which, although unsatisfactory to the majority of the stockholders (including the Calumet & Hecla Company) is not shown to seriously jeopardize the interests of the Osceola Company and its stockholders. The rules and considerations applicable to conditions such as here presented are so fully stated in the recent case of *Pere Mar-*

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*quette Ry. Co. v. Bradford* (C. C.) 149 Fed. 492, as to make unnecessary further citation of authorities thereon. The consideration that complainant would have no right to appeal from an order refusing an injunction is properly entitled to weight. *Harriman v. Northern Securities Co.* (C. C.) 132 Fed. 464. Such injunction will not disturb the existing status, which is not, properly speaking, the abstract right of majority stock control, but rather the concrete fact of the present management of the Osceola Company as distinguished from a management by the Calumet & Hecla Company. The Osceola stockholders who have given their proxies to the Calumet & Hecla Company are not punished by the issuing of the contemplated injunction. No reason is suggested why their proxies given that company may not be revoked.

Upon these considerations, the issuing of temporary injunction in substantially the terms of the existing restraining order, which would operate to protect all interests concerned, seems both proper and expedient.

Temporary injunction will issue accordingly.

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[278] AMERICAN UNION COAL CO. v. PENNSYLVANIA RAILROAD CO.

(Circuit Court, E. D. Pennsylvania. February 7, 1908.)

[159 Fed. Rep., 278.]

CARRIERS — RATES — DISCRIMINATION — INTERSTATE COMMERCE ACT — PLEADING.—Where a count in a complaint against an interstate carrier alleged a discrimination in rates against plaintiff, in that defendant charged plaintiff the full tariff rates and permitted plaintiff's competitors by a device to transport their similar products at a lower rate, it stated a cause of action for violating Interstate Commerce Act, Act Feb. 4, 1887, c. 104, § 2, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3155], prohibiting discrimination, and was therefore not demurrable, though it also insufficiently attempted to allege a combination or conspiracy, on defendant's part, with certain other railroads to restrain trade, and to recover treble damages under the Sherman Anti-Trust Act, Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200.]<sup>a</sup>

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## Opinion of the Court.

**SAME—REASONABLENESS OF RATES.**—Where an interstate carrier charged plaintiff the regular posted tariff rates, plaintiff could not maintain an action at law either under the Anti-Trust Act, Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], or the Interstate Commerce Act, Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], for a readjustment of such rates on the ground that the same were unreasonable or unlawful, its remedy being by application to the Interstate Commerce Commission to have the schedule of tariffs adjusted on a reasonable and lawful basis.

*J. W. M. Newlin*, for plaintiff.

*John Hampton Barnes*, for defendant.

## [279] ON DEMURRER TO PLAINTIFF'S STATEMENT.

HOLLAND, District Judge.

In the first count in the statement the plaintiff has a good cause of action, upon the facts stated, under the Interstate Commerce Act, for a violation of the second section of the Interstate Commerce Act, as amended, for discriminating against plaintiff in charging it the full tariff rates and permitting its competitors, by a device, to transport their coal at a lower rate. The plaintiff, however, alleges a combination or conspiracy on the part of the defendant with certain other railroads to restrain trade, which combination, etc., is effected by charging the plaintiff the tariff rates and charging its competitors less than the tariff rates. This difference in charge per ton is laid as the damage suffered by plaintiff, and treble the amount is claimed under the Sherman Anti-Trust Act, Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]; that is to say: The first count attempts to lay a cause of action under the Sherman Anti-Trust Act by alleging a combination and conspiracy of the defendant with other railroads, but the facts averred in the statement do not set forth a combination or conspiracy to restrain trade, and the damage claimed is for an injury for which damage can be collected only under the Interstate Commerce Act, Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], to wit, by unlawful discrimination against plaintiff in collecting tariff rates from it and by rebates and other

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devices permit its competitors to transport their coal for less per ton. The second count claims treble damages under the Sherman Anti-Trust Act for an "excessive and unreasonable charge" of 55 cents per ton for certain number of tons of coal transported by the defendant company for the plaintiff at tariff rates. The third count is a claim for treble damages under the Sherman Anti-Trust Act for a charge for the transportation of plaintiff's coal over the defendant's road in excess of the lawful charge for the carriage of said coal, the price charged being the amount specified in the defendant's tariff of rates posted and filed with the Interstate Commerce Commission.

The ground of demurrer is the same to each of the three counts, to wit, that there are no averments of fact in any of the three counts showing an injury to the plaintiff in its business or property within the provisions of the Sherman Anti-Trust Act of July 2, 1890. In this we think the defendant is right. There is no combination and conspiracy set forth in the first count which would entitle the plaintiff to recover treble damages under the Anti-Trust Act, but there is a cause of action under the Interstate Commerce Act, and the count will therefore be sustained under that act, and the matter therein contained, for the purpose of bringing it within the terms of the Anti-Trust Act, can be regarded as surplusage.

The demurrer, however, is sustained as to the second and third counts, because it appears from the facts stated in both these counts that the amount charged by the defendant company was the tariff rates of the defendant company, which they had posted and filed with the Interstate Commerce Commission as required by law. If the plaintiff regarded these charges "unreasonable," as set forth in the second count, or "unlawful," as alleged in the third count, its remedy was to apply [280] to the Interstate Commerce Commission and have the schedule of tariffs adjusted on a "reasonable" and "lawful" basis. There is no right of action either under the Anti-Trust Act or the Interstate Commerce Act for a readjustment of tariff rates filed and posted

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other than through the Interstate Commerce Commission. A shipper cannot maintain an action at law for excessive and unreasonable freight rates exacted on interstate shipments where the rates charged were those which had been duly fixed by the carrier according to the act and had not been found to be unreasonable by the Interstate Commerce Commission. *Texas & Pacific R. R. Co. v. Abilene C. & O. Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553; *Clement v. Louisville & N. R. Co.* (C. C.) 153 Fed. 979.

For the reasons stated, the demurrer to the first count is overruled, and the demurrer to the second and third counts in the statement is sustained.

## ON DISCHARGING RULE FOR AMENDMENT TO STATEMENT.

It is true the proposed amendment follows the wording of the Sherman Anti-Trust Act and the language of the Supreme Court case, *Loewe v. Lawlor* (decided February 3, 1908) 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, in alleging a contract and combination in the form of a trust and conspiracy in restraint of trade, but the facts in detail set out in the amendment, instead of showing a contract or combination in the form of a trust or conspiracy in restraint of trade, show a case prohibited by the commerce act; whereas, in the *Loewe v. Lawlor* case, supra, the facts show a clear conspiracy to restrain trade, prohibited by the Anti-Trust Act. The alleged acts of defendant which caused the damage are those condemned by the commerce act, and the case cannot be brought within the purview of the Anti-Trust Act by using the language of the latter to describe a cause of injury prohibited by the former.

In sustaining the amendment, it was held the first count stated a good cause of action under the commerce act and regarded the statements intended to bring it within the scope of the Anti-Trust Act as surplusage. This amendment would simply restore the count to its original form. Holding still the view expressed upon the demurrer, the rule to show cause why the first count should not be amended is discharged.

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**[85] TRIBOLET v. UNITED STATES.**

(Supreme Court of Arizona. March 27, 1908.)

[95 Pacific Reporter 85.]

**MONOPOLIES—COMBINATION AND RESTRAINT OF TRADE—INDICTMENT.—**

An indictment alleged that defendants did engage in a combination in form of trust, and entered a conspiracy in restraint of trade and commerce as follows: That defendant, T., and others, were engaged in the wholesale and retail meat business in competition prior to August 1, 1906, and that thereafter on August 23d, they being engaged in a combination and form of trust, and in a conspiracy in restraint of trade in furtherance thereof, entered into a contract and formed defendant corporation, to which they transferred the business of each of them, agreeing not to again engage in the meat business in the city of Phoenix; that the combination and conspiracy was formed to carry out restrictions in trade and commerce, and to increase the price and prevent competition in the sale of fresh meats in such city, etc. *Held*, that the indictment did not charge defendants with making a contract which was in itself in restraint of trade and commerce, but that the contract was alleged only as one of the steps [86] by which the "combination or conspiracy" was brought about, and as an overt act in furtherance thereof.\*

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Monopolies, § 20.]

**INDICTMENT—DUPLICITY—"COMBINATION" OR "CONSPIRACY."**

Sherman Anti-Trust Law (Act July 2, 1890, c. 647, § 3, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3201]) declares that every contract, combination, and form of trust or otherwise, and conspiracy in restraint of trade or commerce in any territory of the United States, or in restraint of trade or commerce between any such territory and another, etc., are declared illegal, and that every person who shall make any such contract or engage in any such "combination or conspiracy" shall be deemed guilty of a misdemeanor. *Held*, that the words "combination or conspiracy" as so used were synonymous, and hence an indictment alleging that defendants entered into a "combination or conspiracy" in restraint of trade was not duplicitous as alleging two distinct offenses.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1275, 1454-1461; vol. 8, p. 7613.]

**MONOPOLIES—STATUTES—SCOPE OF PROHIBITION.**

Sherman Anti-Trust Law (Act July 2, 1890, c. 647, § 3, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3201]), prohibiting combinations or conspiracies in restraint of trade or commerce in any territory of

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the United States, was not limited to combinations and conspiracies which operated in restraint of the trade of substantially an entire territory, but applied as well to a combination and conspiracy in restraint of trade and commerce in a single city in a territory.

INDICTMENT—DEFECTS OF FORM—STATUTORY OFFENSES.

Where an indictment for combination or conspiracy in restraint of trade in violation of Sherman Anti-Trust Law (Act July 2, 1890, c. 647, § 3, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3201]) was uncertain as to some of its allegations, owing to the fact that the offense was first charged in the language of the statute, and the purposes and objects of the conspiracy were not fully stated until after the overt acts were described, the defect was one of form, and not of substance, not prejudicial to defendant, and therefore immaterial under U. S. Rev. St. § 1025 (U. S. Comp. St. 1901, p. 720), providing that no indictment shall be quashed for a non-prejudicial defect of form.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 486, 487.]

MONOPOLIES—INDICTMENT—OBJECT.

The object of a combination or conspiracy in restraint of trade being unlawful both at common law and by statute, an indictment therefor was not objectionable for failure to allege the means by which the combination or conspiracy was to be accomplished.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Monopolies, § 20.]

SAME—COMBINATION IN RESTRAINT OF TRADE—CORPORATIONS—LIABILITY OF OFFICERS.

Where defendant and H. entered into a combination and conspiracy in restraint of trade to control the meat business in Phoenix, Ariz., and for this purpose organized a corporation, the fact that defendant acted merely as an officer and stockholder in such corporation, and that the corporation was held not guilty, did not prevent defendant's conviction for violating the Sherman Anti-Trust Law (Act July 2, 1890, c. 647, § 3, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3201]), prohibiting a combination or conspiracy in restraint of trade.

Appeal from District Court, Third District; before Justice Edward Kent.

S. J. Tribolet was convicted of violating the Sherman anti-trust law, and he appeals. Affirmed.

*Thomas Armstrong, Jr.*, and *G. P. Bullard*, for appellant.  
*J. L. B. Alexander*, U. S. Atty., and *George D. Christy*, Asst. U. S. Atty.

## Opinion of the Court.

CAMPBELL, Judge.

P. T. Hurley, S. J. Tribolet, and the Phoenix Wholesale Meat & Produce Company, a corporation, were indicted for a violation of the provisions of section 3 of the act of Congress approved July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3201), commonly known as the "Sherman Anti-Trust Law," which reads: "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such territory and another \* \* \* is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor. \* \* \*" Upon the trial Hurley testified on behalf of the United States and was given immunity; the indictment against him, upon motion of the Government, being dismissed. In submitting the case to the jury the trial court directed that a verdict of not guilty be returned in favor of the Phoenix Wholesale Meat & Produce Company, a corporation, on the ground that there was no testimony warranting its conviction. The jury found the defendant, S. J. Tribolet, guilty, and from the judgment entered upon the verdict, and from the refusal of the court to grant a new trial, he brings this appeal.

The indictment charges that the defendants, "on or about the 1st day of September, A. D. 1906, and within the said third judicial district of the Territory of Arizona, and within the county of Maricopa in said territory of Arizona, did then and there unlawfully, willfully, and knowingly engage in a combination in form of trust and into a conspiracy each with the other in restraint of trade and commerce in the city of Phoenix, in the county of Maricopa, and within said third judicial district of the Territory of Arizona, in the manner following: That on and prior to the 1st day of August, 1906, P. T. Hurley and J. C. Hurley, under the firm name of P. T. Hurley, S. J. Tribolet, A. Weiler, and the Co-operative Meat Company, were engaged in the business of slaughtering beef cattle, sheep, goats, and swine, and selling



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at retail and wholesale the fresh meats thereof in said city of Phoenix, and were each of them then and there engaged in said business in open and free competition with the others; that thereafter, to wit, on or about the 23d day of August, 1906, the said P. T. Hurley and J. C. Hurley, under the firm name of [87] P. T. Hurley, and the said S. J. Tribolet, being then and there engaged in a combination in form of trust and in a conspiracy in restraint of trade and commerce, and in furtherance of said combination and said conspiracy in restraint of trade and commerce." Then follow allegations that the defendants Hurley and Tribolet obtained control and possession of the Co-operative Meat Company and discontinued its business; that they, in further pursuance of the combination and conspiracy, organized the defendant corporation and transferred to it the business theretofore conducted by each of them, receiving in exchange the capital stock of the corporation, and that they became the directors and officers of the corporation, and as such conducted its affairs; that all of the defendants, in furtherance of the combination and conspiracy, thereupon purchased the business of Weiler, and caused it to be transferred to the corporation, and caused Weiler to execute a contract with the corporation whereby he agreed not to again engage in the business of slaughtering fresh meats in the city of Phoenix. The combination and conspiracy is then described as having been "formed for the purpose of carrying out restrictions in trade and commerce in, increasing the price and preventing competition in the sale of certain commodities intended for sale and consumption in, the city of Phoenix, in the county of Maricopa, territory of Arizona, to wit, fresh beef, fresh mutton, fresh goat, and fresh pork, and for the purpose of unlawfully fixing and maintaining uniform and graduated figures for the sale of said fresh meats in said city of Phoenix that the price thereof might be increased"; and then it is alleged that in further pursuance of said combination prices of meats were arbitrarily increased 20 per cent. to purchasers by wholesale and 40 per cent. to purchasers by retail. A demurrer was interposed and overruled, and the ruling of the court in that respect is assigned as error.

## Opinion of the Court.

It is claimed that, if any offense is pleaded, the indictment is bad for duplicity, for that three separate and distinct offenses are alleged in the single count of the indictment, namely: (1) The making of a contract in restraint of trade and commerce; (2) a combination in form of trust in restraint of trade and commerce; (3) a conspiracy in restraint of trade and commerce, and that the statute denounces each of them as a separate and distinct offense. As we view the indictment, it does not charge the defendants with the making of a contract which in itself was in restraint of trade and commerce. It would be difficult, if not impossible, to effect a combination or conspiracy without a contract or agreement. We construe the indictment as alleging the contract to have been made as one of the steps by which the combination was brought about, and as an overt act in furtherance of the conspiracy. The indictment does, however, directly charge a combination and conspiracy. It appears to be appellant's contention that Congress means to punish as conspirators those who engage to do those things which are unlawfully in restraint of trade or commerce, though in fact no restraint is accomplished, and also to denounce a combination which actually results in restraint of trade or commerce and punish those who engage in it. The meaning of these terms as used in this section, which are precisely those used in the first section of the act, which relates to interstate commerce, have been commented upon by different courts, but the difference between a combination and a conspiracy in restraint of trade, if any exists, has not authoritatively been pointed out. By some the words as used here seem to be regarded as synonymous. Mr. Justice Holmes, in his dissenting opinion in *Northern Securities Company v. United States*, 193 U. S. 197, in discussing the act, says, at page 403, 24 Sup. Ct. 436, at page 469 (48 L. Ed. 679): "The words hit two classes of cases, and only two—contracts in restraint of trade, and combinations or conspiracies in restraint of trade." The bill of the government in that case refers throughout to the acts of the defendants as constituting an "unlawful combination or conspiracy." The majority opinion also frequently refers to the defendants as having engaged in a "combination or conspiracy," and quotes with approval from

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the case of *Morris Run Coal Company v. Barclay Coal Company*, 68 Pa. 173, 8 Am. Rep. 159, in which the Supreme Court of Pennsylvania says, in referring to a combination in violation of a state statute: "In all such combinations where the purpose is injurious and unlawful the gist of the offense is the conspiracy." In *Rice v. Standard Oil Company* (C. C.) 134 Fed. 464, Judge Lanning quotes the words of Mr. Justice Holmes, and says: "In one count there may be a charge of an unlawful contract, and in another a charge of an unlawful combination or conspiracy; but the two unlawful things cannot be declared upon as synonymous terms, and charged in a single count." See, also, *Chicago W. & V. Coal Co. v. People*, 214 Ill. 444, 73 N. E. 770. But whether the words have the same meaning, or whether they describe two offenses, they both have reference to the same object sought to be accomplished by the statute, to wit, the prevention of restraint of trade and commerce. In *Crain v. United States*, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097, the indictment was drawn to charge an offense under section 5421, Rev. St. (U. S. Comp. St. 1901, p. 3667), and alleged the doing of several different acts, and the causing to be done of the same acts, all of which acts and the causing to be done of such acts were prohibited by the statute. In discussing the indictment the Supreme Court says: "Undoubtedly the section of the revised statutes under which the [88] indictment was framed embraces several distinct acts, the doing of either of which is punishable. \* \* \* The second count charged in substance, not only that the defendant did things and each of them, the doing of which or either of which the statute prohibited, but also that he caused the doing of such things and each of them. Was the count, thus drawn, so defective as to require that judgment upon it be arrested? \* \* \* We are of opinion that the objection to the second count upon the ground of duplicity was properly overruled. The evil that Congress intended to reach was the obtaining of money from the United States by means of fraudulent deeds, powers of attorney, orders, certificates, receipts, or other writings. The statute was directed against certain defined modes for accomplishing a general object, and declared that the doing of either one of several specified things, each having reference

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to that object, should be punished by imprisonment at hard labor for a period of not less than five years nor more than ten years, or by imprisonment for not more than five years, and a fine of not more than \$1,000. We perceive no sound reason why the doing of the prohibited thing in each and all of the prohibited modes may not be charged in one count so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute. And this is a view altogether favorable to an accused who pleads not guilty to the charge contained in a single count; for a judgment on a general verdict of guilty upon that count will be a bar to any further prosecution in respect of any of the matters embraced by it." In enacting the statute under consideration the general purpose of Congress was to prevent restraint of trade and commerce. It is directed against certain defined modes of accomplishing that general object, and declares that the engaging in either of those modes, each having reference to that object, shall be punished. We think this indictment comes squarely within the rule as above announced by the Supreme Court, and that this objection to it is not well taken.

It is next urged by the appellant that the indictment does not charge any violation of the law, for the reason that it charges an engaging in a combination and conspiracy in restraint of trade and commerce in the city of Phoenix, and not in or throughout the territory; that the act prohibits only those combinations and conspiracies which affect substantially the trade or commerce of the entire territory, and not those in restraint of the trade or commerce of a particular community. We think the construction contended for entirely too narrow. It might as justly be claimed that the language of the first section making illegal such combinations or conspiracies "in restraint of trade among the several states or with foreign nations" applies only to those combinations which directly affect trade and commerce among all the states, or with all the foreign nations.

Appellant further contends that the indictment is insufficient for the reason that it is not direct and certain, and charges a combination or conspiracy only in the language of the statute without stating the objects, purposes, and ends to

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be achieved. We think the indictment open to criticism as to not being direct and certain as to some of its allegations. The confusion arises from the pleader first charging the offense in the language of the statute, and not fully stating its purposes and objects until after the overt acts are described. The defect, however, is one of form rather than one of substance, and does not tend to the prejudice of the defendant. Therefore the indictment is not invalid. Section 1025, Rev. St. (U. S. Comp. St. 1901, p. 720).

It is further claimed that the indictment should allege the means by which the combination or conspiracy was to be accomplished; but this we regard as unnecessary, since the object to be attained by the combination or conspiracy in itself is unlawful both at common law and by statute. See authorities collected in 8 Cyc. p. 667.

The refusal of the court to direct a verdict of not guilty as to appellant is assigned as error. His argument in support of this assignment, if we apprehend it correctly, is not that the evidence does not disclose that he engaged in the combination and conspiracy with the defendant Hurley, but since his acts centered in and about the corporation, and he simply acted as its officer and stockholder, he could not be guilty and the corporation innocent. The corporation was the instrument by and through which the combination of those who promoted it became effective, and, had there been a verdict of guilty against it, we should have been disposed to hold it supported by the evidence, for the same reasons given by the Supreme Court for holding that "the Securities Company made itself a party to a combination in restraint of interstate commerce that antedated its organization, as soon as it came into existence, doing so, of course, under the direction of the very individuals who promoted it." *Northern Securities Company v. U. S.*, *supra*.

There was sufficient evidence to warrant the jury in arriving at the verdict which they returned, and we will not disturb it, even though the trial court may have erred in directing a verdict of not guilty as to the defendant corporation.

The refusal of the court to give two certain instructions requested by appellant is assigned as error. The legal proposition involved in one is disposed of by what we have hereto-

## Syllabus.

fore said, and the other was given in substance in the general charge of the court.

No error appearing, the judgment of the district court is affirmed.

SLOAN, DOAN, and NAVE, Justices, concur.

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[274] LOEWE v. LAWLOR.\*

(Certiorari to the Circuit Court of Appeals for the Second Circuit.)

[208 U. S. 274.]

No. 389. Argued December 4, 5, 1907.—Decided February 3, 1908.

After the Circuit Court of Appeals has certified questions to this court and this court has issued its writ of certiorari requiring the whole record to be sent up, it devolves upon this court under § 6 of the Judiciary Act of 1891, to decide the whole matter in controversy in the same manner as if it had been brought here for review by writ of error or appeal.<sup>b</sup>

The Anti-Trust Act of July 2, 1890, 26 Stat. 209, has a broader application than the prohibition of restraints of trade unlawful at common law. [275] It prohibits any combination which essentially obstructs the free flow of commerce between the States, or restricts, in that regard, the liberty of a trader to engage in business; and this includes restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of interstate trade except on conditions that the combination imposes. A combination may be in restraint of interstate trade and within the meaning of the Anti-Trust Act although the persons exercising the restraint may not themselves be engaged in intrastate trade, and some of the means employed may be acts within a State and individually beyond the scope of Federal authority, and operate to destroy intrastate trade as interstate trade, but the acts must be considered as a whole, and if the purposes are to prevent interstate transportation the plan is open to condemnation under the Anti-Trust Act of July 2, 1890. *Swift v. United States*, 196 U. S. 375.

The Anti-Trust Act of July 2, 1890, makes no distinction between classes. Organizations of farmers and laborers were not exempted from its operation, notwithstanding the efforts which the records of Congress show were made in that direction.

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\* For other opinions, see (130 Fed. Rep. 633) vol. 2, p. 563; (142 Fed. Rep. 216) vol. 2, p. 854; (148 Fed. Rep. 924), *ante*, p. 41; (187 Fed. Rep. 522); vol. 4, p. 284.

<sup>b</sup> Syllabus and statements of arguments copyrighted, 1908, by the Banks Law Publishing Co.

## Argument for Plaintiffs in Error.

A combination of labor organizations and the members thereof, to compel a manufacturer whose goods are almost entirely sold in other States, to unionize his shops and on his refusal so to do to boycott his goods and prevent their sale in States other than his own until such time as the resulting damage forces him to comply with their demands, is, under the conditions of this case, a combination in restraint of interstate trade or commerce within the meaning of the Anti-Trust Act of July 2, 1890, and the manufacturer may maintain an action for threefold damages under § 7 of that act.

[52 L. ed. 488.]<sup>a</sup>

Any combination whatever to secure action which essentially obstructs the free flow of commerce between the States, or restricts, in that regard, the liberty of a trader to engage in business, is within the inhibition of the Anti-Trust Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), against combinations "in restraint of trade or commerce among the several States."

A combination by members of labor organizations to destroy an existing interstate traffic in hats by preventing the manufacturers, through the instrumentality of a boycott, from manufacturing hats intended for transportation beyond the State, and to prevent their vendees in other States from reselling the hats so transported, and from further negotiating with the manufacturers for the purchase and transportation of such hats from the place of manufacture to the various places of destination, is a combination "in restraint of trade or commerce among the several States," within the meaning of the Anti-Trust Act of July 2, 1890, the members of which are liable for the threefold damages which, under § 7 of that act, may be recovered by those injured in business or property by violations of the act, although a negligible amount of intrastate business may be affected in carrying out the combination, and although the members of the combinations are not themselves engaged in interstate commerce.

The facts are stated in the opinion.

*Mr. James M. Beck* and *Mr. Daniel Davenport* for plaintiffs in error:

The complaint must be considered as an entirety. A combination so great in scope, and complex in its operations necessarily contains elements, which in and by themselves are either innocent or beyond Federal jurisdiction. The complaint must stand, if, *as a whole*, it substantially sets forth a combination, whose purpose and effect is to restrain interstate trade. It is impossible for the plaintiffs to set

<sup>a</sup> Paragraphs following copyrighted, 1908, by Lawyers Co-Operative Pub. Co.

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forth all the defendants' secret operations with definiteness and particularity. *Swift v. United States*, 196 U. S. 375.

The Anti-Trust Act is not limited to restraints of interstate [276] trade or commerce that are unreasonable in their nature, but embraces all direct restraints imposed by any combination, conspiracy or monopoly upon such trade or commerce. *Northern Securities case*, 193 U. S. 197, 331. The burden is on whoever seeks to read for their own benefit an exception into this sweeping and all-comprehensive language.

It matters not that the defendants were members of labor unions and were not themselves engaged in carrying on any form of interstate trade; nor that their operations also embraced restraint of trade within a State; nor that they did not, in addition to the other steps taken by them to effect their purpose, resort to the actual seizure of the plaintiffs' hats while in transit or otherwise physically obstruct transportation; nor that they combined to restrain and destroy the plaintiffs' interstate trade as a means to compel them to "unionize" their factory, as a step in their broader conspiracy to force all hat manufacturers to do so; these circumstances were urged upon the trial court by the defendants, and it erroneously attached some importance to them in reaching its conclusion.

• Congress has power to declare and has declared, that all interstate trade shall be absolutely free from all direct restriction through combinations, and every such combination stands condemned in the express terms of the statute. A combination to restrain and prevent the plaintiffs from selling and disposing of their product to customers in other States and to restrain and prevent such customers in other States from buying them, is a combination in restraint of interstate trade as much as a combination to prevent by physical violence their transportation from State to State. It does not matter that it also embraces trade wholly within a State. Indeed, if the destruction of trade within a State is the means resorted to, to prevent the customers in that State from buying from the manufacturer or dealer in another State, it is prohibited by the Sherman Anti-Trust Law.

Liability under the anti-trust law does not depend upon any physical obstruction of interstate transportation. Com-



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[277] merce is something more than mere transportation. It also consists in traffic and in that even larger field of interstate communication to which Marshall gave the all-embracing term of commercial "intercourse."

The field of interstate commerce includes all essential acts antecedent to physical transportation and subsequent thereto, where necessary to preserve the free flow of such commerce. *Swift & Co. v. United States*, 196 U. S. 375.

It is equally well settled that the Federal power does not end with the mere physical delivery of the article transported in the State of destination. The Federal power is coextensive with the subject on which it acts and cannot be stopped at the external boundary of the State, but must enter the interior and must be capable of authorizing the disposition of those article which it introduces, so that they may become mingled with the common mass of property within the territory entered. *Leisy v. Hardin*, 135 U. S. 100. See also *Robbins v. Shelby County Taxing District*, 120 U. S. 489.

In *Addyston Pipe Co. v. United States*, 175 U. S. 211, an agreement which, prior to any act of transportation, limited the prices at which pipe could be sold after transportation, was held by this court to be a violation of the Anti-Trust Act. In *Chattanooga Foundry Co. v. City of Atlanta*, 203 U. S. 390, this court sustained a recovery under § 7 of the Sherman Anti-Trust Law in a suit growing out of the combination which was declared invalid in the *Addyston Pipe case (supra)*.

The court clearly recognized that to prevent a dealer from making any sale to a customer in another State, and therefore preventing altogether the possible transportation of the merchandise, was as much within the law as to enhance the price of a commodity which had actually been purchased and shipped.

Similarly in the case at bar the avowed object and necessary result of the labor combinations was to prevent altogether purchases from the plaintiffs by theirs customers in other States. The total prevention of interstate sales, whereby no act of interstate transportation takes place, as is much within the statute [278] as a physical restraint of transportation when it actually commences.

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In the case of *Montague v. Lowry*, 193 U. S. 38, this held that an obstruction to the purchase of tiles, a fact antecedent to physical transportation, was within the prohibition of the Sherman Anti-Trust Law.

Under the pleadings in the case at bar, the court must conclude that there was an existing interstate traffic between the plaintiff and citizens of other States and that for the direct purpose of destroying such interstate traffic the defendants combined not merely to prevent him from manufacturing articles then and there intended for transportation beyond the State, but also to prevent the vendees from either reselling the hats, which they had imported from Connecticut, or from further negotiating with the plaintiffs for the purchase and incidental transportation of such hats from Connecticut to the various places of destination. It is true that some of the means whereby the interstate traffic was to be destroyed, were, when detached, acts within a State and that some of them were in themselves and apart from their obvious purpose and necessary effect, acts beyond the scope of Federal authority. The acts must be considered as a whole and defendants' contention in this case, that because the means, which they adopted to destroy the plaintiffs' interstate traffic, operated at one end before physical transportation commenced and at the other end after physical transportation ended, is wholly unimportant, if the purposes of the combination were to prevent any interstate transportation at all.

Defendants' claim is not supported by the *Stockyards cases* (*Hopkins v. United States*, 171 U. S. 587, and *Anderson v. United States*, 171 U. S. 604).

In those cases it was held that there was no purpose to obstruct or restrain interstate commerce, that the combination related to purely local business.

The combination as an unreasonable one and criminal at common law falls under the opinion of Mr. Justice Brewer in [279] the *Northern Securities case*, which possibly foreshadows a ruling by this court that the statute extends only to those cases in which the restraint is unreasonable, or unlawful at common law. American and English Decisions in Equity, Vol. 7, page 562; *Martin v. McFall*, 55 Atl. Rep.

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465; *Callan v. Wilson*, 127 U. S. 540; *Arthur v. Oakes*, 68 Fed. Rep. 310.

To the same effect are *Toledo A. A. & N. M. R. Co. v. Penn. Co.*, 54 Fed. Rep. 730, per TART, J., and the following cases: *Purington v. Hinchcliff*, 219 Illinois, 159, 167; *Chicago W. & V. Coal Co. v. People*, 214 Illinois, 421; *Doremus v. Hennessy*, 176 Illinois, 608; *State v. Donaldson*, 3 Vroom, 151; *State v. Stewart*, 59 Vermont, 298; *Sherry v. Perkins*, 147 Massachusetts, 212; *Crump v. Com.*, 84 Virginia, 927; *Erdman v. Mitchell*, 207 Pa. St. 79; *Gatzow v. Bruening*, 106 Wisconsin, 1; *Old Dominion S. S. Co. v. McKenna*, 30 Fed. Rep. 48; *Reg v. Rowlands*, 17 A. and E. (N. S.) 671, 685; *Loewe v. California State Federation of Labor*, 139 Fed. Rep. 71.

Members of a combination or conspiracy under the anti-trust law are not exempt because they are not engaged in interstate transportation.

They contend that the Sherman law is inapplicable because the defendants are not themselves engaged in interstate commerce.

Congress did not provide that one class in the community could combine to restrain interstate trade and another class could not. It had no respect for persons. It made no distinction between classes. It provided that "every" contract, combination or conspiracy in restraint of trade was illegal.

The legislative history of the Sherman Anti-Trust Law clearly shows that its applicability to combinations of labor as well as of capital was not an oversight.

After the Sherman law was enacted bills were introduced in the 52d Congress, H. R. 6,640, § 1; 55th Congress, Senate 1,546, § 8; H. R. 10,539, § 7; 56th Congress, H. R. 11,667, § 7; 57th Congress, S., 649, § 7; H. R. 14,947, § 7, to amend the Sherman Anti-Trust Law so that it would be inapplicable to labor [280] organizations, and while one of these (H. R. 10,539, § 7) passed the House in the 56th Congress, none ever became a law.

Congress, therefore, has refused to exempt labor unions from the comprehensive provisions of the Sherman law against combinations in restraint of trade, and this refusal is the more significant, as it followed the recognition by the

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courts that the Sherman Anti-Trust Law applied to labor organizations. *United States v. Workingmen's Amalgamated Council*, 54 Fed. Rep. 994; *Waterhouse v. Comer*, 55 Fed. Rep. 149; *United States v. Elliott*, 62 Fed. Rep. 801; *Thomas v. Cincinnati Ry. Co.*, 62 Fed. Rep. 803; *In re Debs*, 158 U. S. 534; *United States v. Freight Association*, 166 U. S. 356.

In the following cases the combination was held valid: *United States v. Knight*, 156 U. S. 1; *Hopkins v. United States*, 171 U. S. 578; *Anderson v. United States*, 171 U. S. 604; *Bement v. Harrow*, 186 U. S. 70; *Chicago Board v. Christie*, 198 U. S. 236; *Cincinnati Packet Co. v. Bay*, 200 U. S. 179.

In the following cases the combination was held invalid: *In re Debs*, 158 U. S. 564; *United States v. Trans-Missouri Ass'n*, 166 U. S. 290; *United States v. Joint Traffic Ass'n*, 171 U. S. 505; *United States v. Addyston Pipe Co.* 175 U. S. 211; *Montague v. Lowry*, 193 U. S. 38; *United States v. Northern Securities*, 193 U. S. 197; *United States v. Swift*, 196 U. S. 375; *City of Atlanta v. Chattanooga*, 203 U. S. 390.

*Mr. John Kimberly Beach* and *Mr. John H. Light*, with whom *Mr. Robert DeForest* and *Mr. Howard W. Taylor* were on the brief, for defendants in error:

On general principles the complaint states no cause of action which falls within the Federal jurisdiction over controversies between citizens of the same State.

As there is no suggestion of any sale or attempt to sell the plaintiffs' hats in original packages, the manufacture of the plaintiffs' hats in Connecticut, and their disposition in the State of destination after delivery to the consignee, are matters which are exclusively within State power of regulation, even [281] though such regulation might necessarily diminish the volume of the plaintiffs' interstate business. *Coe v. Erroll*, 116 U. S. 517, 525; *Kidd v. Pierson*, 128 U. S. 1, 24.

And see the *License Cases*, 5 How. 504, and *Leisy v. Hardin*, 135 U. S. 116.

Federal jurisdiction can not include combinations of persons whose operations restrain interstate commerce only indirectly, and incidentally to the direct effect of the combination on the manufacture of the plaintiffs' hats in Connecti-

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cut, or on the disposition of such hats in other States after the breaking up of the original package of importation. A combination of persons to restrict the manufacture of the plaintiffs' hats in Connecticut, or to restrict their sale in California after the original package of importation has been broken is a combination which, on general principles, is to be dealt with by the several States, respectively, and not by the United States. *Hopkins v. United States*, 171 U. S. 578, 594; *United States v. Knight*, 156 U. S. 1.

In the cases relied upon by the plaintiffs in error there has been present the element of a direct restraint by legislation, contract or physical interference, of some transaction or operation admittedly belonging to interstate, as distinguished from intrastate, commerce; and it has been held that the Federal jurisdiction was not ousted because such legislation, contract or interference also affected other operations and transactions admittedly belonging to intrastate commerce.

The converse of this proposition must be equally true, namely, that if the direct restraint of legislation, contract or interference is confined to operations admittedly belonging to intrastate commerce, the State jurisdiction will not be ousted, because such legislation, contract or interference also affects other operations relating to the same general transaction, which admittedly belong to interstate commerce.

The complaint 'fairly alleges a diversion of plaintiffs' trade by inducing customers in another State not to buy his goods. So long as it is understood that the means employed for diverting this trade are means operating on the customer and not [282] operating directly upon the course of commerce, it is immaterial whether the means employed be lawful or unlawful.

It is plain from the whole complaint that the defendants have no ultimate design upon interstate commerce as such, and that their real design is to unionize the plaintiffs' factory, or to bring all hat factories in the United States under union conditions. True, that fact will not protect them, if in the pursuit of such design they employ means which directly obstruct the course of interstate commerce; but it will protect them unless the use of such means is specially alleged.

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Again, the conspiracy stated is not among persons who are themselves engaged in interstate commerce, and therefore its operation on the business of a non-member is not incidental to its internal effect upon interstate commerce among the members of the combination. *Montague v. Lowry*, 193 U. S. 38; *Chattanooga Foundry v. City of Atlanta*, 203 U. S. 390; the *Beef Trust* case, 195 U. S. 375, distinguished. In these cases there was a sufficient proof of an agreement to regulate the interstate commerce of the parties to the combination, and it was held that other allegations of domestic transactions in furtherance of such main purpose were properly pleaded as part of the general scheme.

The complaint states no cause of action under the Sherman Act as construed by this court, including those reviewed in the *Northern Securities Company* cases, 193 U. S. 197, as follows: *United States v. Knight*, 156 U. S. 1; *Hopkins v. United States*, 171 U. S. 578; *Addyston Pipe & Steel* case, 175 U. S. 211; *Anderson v. United States*, 171 U. S. 604; *Montague v. Lowry*, 193 U. S. 27; *Swift v. United States*, 195 U. S. 375; *Chattanooga Foundry v. Atlanta*, 203 U. S. 391.

Taking these cases together, they furnish the logical rule that a combination within the act must either appear to be a combination whose object is in restraint of interstate commerce, or if the combination be formed for some other object, that some one of the means employed must appear to be in itself a direct restraint upon interstate commerce.

[283] The design of the defendants is not to restrain interstate commerce, but to unionize plaintiffs' factory, and none of the means for carrying out this design constitutes in itself a direct restraint upon interstate commerce. Strikes in local factories, the publication of false statements as to the plaintiffs' attitude toward organized labor, etc., and the restraint of domestic sales by retail dealers in different States, are not in themselves in restraint of interstate commerce. The case at bar cannot be distinguished in principle from the *Anderson Case*, 171 U. S. 602, in which it was decided that a boycott of the business of a person engaged in interstate commerce was not in direct restraint of interstate commerce, when it was entered into for the purpose of compelling the

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individual in question to join the yard traders' association. In principle, that decision must control the question whether a boycott of the plaintiffs' business for the purpose of compelling them to unionize their factory is in direct restraint of interstate commerce.

By leave of court, *Mr. Thomas Care Spelling* filed a brief herein on behalf of The American Federation of Labor and others.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

This was an action brought in the Circuit Court for the District of Connecticut under § 7 of the Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209, claiming threefold damages for injuries inflicted on plaintiffs by combination or conspiracy declared to be unlawful by the act.

Defendants filed a demurrer to the complaint, assigning general and special grounds. The demurrer was sustained as to the first six paragraphs, which rested on the ground that the combination stated was not within the Sherman Act, and this rendered it unnecessary to pass upon any other questions in the case; and upon plaintiffs declining to amend their complaint the court dismissed it with costs. 148 Fed. Rep. 924; and see 142 Fed. Rep. 216; 130 Fed. Rep. 633.

[284] The case was then carried by writ of error to the Circuit Court of Appeals for the Second Circuit, and that court, desiring the instruction of this court upon a question arising on the writ of error, certified that question to this court. The certificate consisted of a brief statement of facts, and put the question thus: "Upon this state of facts can plaintiffs maintain an action against defendants under section 7 of the Anti-Trust Act of July 2, 1890?"

After the case on certificate had been docketed here plaintiffs in error applied, and defendants in error joined in the application, to this court to require the whole record and cause to be sent up for its consideration. The application was granted and the whole record and cause being thus brought before this court it devolved upon the court, under § 6 of the Judiciary Act of 1891, to "decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal."

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The case comes up, then, on complaint and demurrer, and we give the complaint in the margin.\*

\*The complaint alleged that the defendants were residents of the District of Connecticut and that complainants resided in Danbury, in that district, were copartners and located and doing business as manufacturers and sellers of hats there; that they had "a factory for the making of hats, for sale by them in the various States of the Union, and have for many years employed, at said factory, a large number of men in the manufacture and sale of said hats, and have invested in that branch of their business a large amount of capital, and in their business of selling the product of their factory and filling orders for said hats, have built up and established a large interstate trade, employing more than two hundred and thirty (230) persons in making and annually selling hats of a value exceeding four hundred thousand (\$400,000) dollars.

"4. The plaintiffs, deeming it their right to manage and conduct their business without interference from individuals or associations not connected therewith, have for many years maintained the policy of refusing to suffer or permit any person or organization to direct or control their said business, and in consequence of said policy, have conducted their said business upon the broad and patriotic principle of not discriminating against any person seeking employment because of his being or not being connected with any labor or other organization, and have refused to enter into agreement with any person or organization whereby the rights and privileges, either of themselves or any employee, would be jeopardized, surrendered to or controlled by said person or organization, and have believed said policy, which was and is well known to the defendants, to be absolutely necessary to the successful conduct of their said business and the welfare of their employees.

"5. The plaintiffs, for many years, have been and now are engaged in trade and commerce among the several States of the Union, in selling and shipping almost the whole of the product of their said factory by common carriers, from said Danbury to wholesale dealers residing and doing business in each of the States of Maine, Massachusetts, Rhode Island, New York, New Jersey, Pennsylvania, Maryland, Virginia, Ohio, Illinois, Michigan, Wisconsin, Missouri, Nebraska, Arkansas, California and other States, to the amount of many hundreds of thousands of dollars, and in sending agents with samples from said Danbury into and through each of said States to visit said wholesale dealers at their places of business in said several States, and solicit and procure from them orders for said hats, to be filled by hats to be shipped from their said factory at said Danbury, by common carriers to said wholesale dealers, to be by them paid for after the delivery thereof at their several places of business.

"6. On July 25, 1902, the amount of capital invested by the plaintiffs in said business of making and selling hats, approximated one



## Opinion of the Court.

[285] The question is whether upon the facts therein averred and admitted by the demurrer this action can be maintained under the Anti-Trust Act.

The first, second and seventh sections of that act are as follows:

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hundred and thirty thousand dollars, and the value of the hats annually sold and shipped by them in previous years, to said dealers in States other than Connecticut, exceeded four hundred thousand dollars, while the value of hats sold by them in the State of Connecticut did not exceed ten thousand dollars.

"7. On July 25, 1902, the plaintiffs had made preparations to do a large and profitable business with said wholesale dealers in other States, and the condition of their business was such as to warrant the full belief that the ensuing year would be the most successful in their experience. Their factory was then running to its full capacity in filling a large number of orders from such wholesale dealers in other States. They were then employing about one hundred and sixty men in the making and finishing departments, a large number in the trimming and other departments, whose work was dependent upon the previous work of the makers and finishers, and they then had about one hundred and fifty dozens of hats in process of manufacture, and in such condition as to be perishable and ruined if work was stopped upon them.

"8. The plaintiffs then were and now are almost wholly dependent upon the sale and shipments of hats as aforesaid, to said dealers in States other than Connecticut, to keep their said factory running and to dispose of its product and their capital in said business profitably employed, and the restraint, curtailment and destruction of their said trade and commerce with their said customers in said States other than Connecticut, by the combination, conspiracy and acts of the defendants, as hereinafter set forth, have been and now are of serious damage to the property and business of the plaintiffs, as hereinafter set forth.

"9. The individual defendants, named in this writ, are all members of a combination or association of persons, styling themselves The United Hatters of North America, and said combination includes more than nine thousand persons, residing in the several States of Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Indiana, Illinois, Missouri, California, and the Province of Ontario in the Dominion of Canada. The said combination is subdivided into twenty subcombinations, each of which is by themselves styled a local union of The United Hatters of North America. Six of said subcombinations are in the State of Connecticut, and known as local Unions 1 and 2, 10 and 11, and 15 and 16 of The United Hatters of North America, and have an aggregate membership of more than three thousand persons residing in the State of Connecticut.

## Opinion of the Court.

[286] 1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such [287] contract or engage in any such combination

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"10. Said combination of persons, collectively known as The United Hatters of North America, owns, controls, edits, publishes, and issues a paper styled The Journal of the United Hatters of North America, in which are published reports of many of the acts of its agents, herein-after mentioned, which circulates widely among its members and the public, and which affords a ready, convenient, powerful and effective vehicle for the dissemination of information to its members and the public as to boycotts declared and pushed by them, and of the acts and measures of its members and agents for carrying such boycotts into effect, and was so used by them in connection with the acts of the defendants hereinafter set forth.

"11. Said combination owns and absolutely controls the use of a certain label or distinguishing mark, which it styles the Union Label of the United Hatters of North America, which mark, when so used by them, affords to them a ready, convenient and effective instrument and means of boycotting the hats of any manufacturer against whom they may desire to use it for that purpose.

"12. The defendants in this suit are also all members of a combination or association of persons calling themselves and known as The American Federation of Labor, which includes more than a million and four hundred thousand members residing in the several States and Territories of the Union, and in the Dominion of Canada, and in all the places in the several States, where the wholesale dealers in hats, hereinbefore mentioned, and their customers reside, and do business. Said combination is subdivided in subordinate groups, or combinations, comprising one hundred and ten national unions and combinations, of which the said combinations of persons styling themselves The United Hatters of North America is one, composed of twelve thousand local unions, twenty-eight State federations or combinations, more than five hundred central labor unions or combinations, and more than two thousand local unions or combinations, which are not included in the above-mentioned national and international combinations.

"13. Said combination of persons collectively known as The American Federation of Labor, owns, controls, edits, publishes, and issues a paper or magazine called The American Federationist, which it declares to be its official organ and mouthpiece, which has a very wide circulation among its members and others, and which affords a ready, convenient, powerful and effective vehicle and instrument for the dissemination of information, as to persons, their products and manufactures, boycotted or to be boycotted, by its members, and as to

## Opinion of the Court.

or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

[288] 2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person

measures adopted and statements to be published, detrimental to such persons and to the sale of their manufactures and for boycotting such persons, their manufactures, and said paper has been and now is constantly used, printed, and distributed for said purposes among its members and the public and was so used by the defendants and their confederates in boycotting the products of the firm of F. Berg & Co., of Orange, New Jersey, and H. H. Roelofs & Co., of Philadelphia, Pa., hat manufacturers, to their very great injury and until the said firms successively yielded to their demands in pursuance of the general scheme of the defendant hereinafter set forth.

"14. The persons united in said combination, known as The American Federation of Labor, including the persons in said subcombination known as The United Hatters of North America, constantly employ more than one thousand agents in the States and Territories of the United States, to push, enforce and carry into effect all boycotts declared by the said members, including those in aid of the combined scheme, purpose and effort hereinafter stated, to force all the manufacturers of fur hats in the United States, including the plaintiffs, to unionize their factories by restraining and destroying their interstate trade and commerce, as hereinafter stated, all of which said agents act under the immediate supervision and personal direction of one Samuel Gompers, who is chief agent of the said combination of persons for said purpose, and of each of the said combinations, and the said agents make monthly reports of their doings in pushing and enforcing and causing to be pushed and enforced said boycotts, and publish the same monthly in said paper known as The American Federationist, of which he is the editor, appointed by the said members, which said paper in connection with said statement or summary, is declared to be the authorized and official mouthpiece of each of said subcombinations, including the said United Hatters of North America. Said statement is declared by the defendants to be a faithful record of the doings of said agents, and each of said statements, made during the period covered by the acts of the defendants against the plaintiffs herein stated, contains the announcement to the members of said combination and the public, that all boycotts declared by them are being by them and their agents pushed, enforced and observed.

"15. Said combination of persons collectively known as The American Federation of Labor, of which the defendants are members, was by

## Opinion of the Court.

or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty [289] of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

the defendants and their other members formed for the purpose among others, of facilitating the declaration and successful maintenance of boycotts, by and for said combination of persons known as The United Hatters of North America, acting through the said Federation of Labor and its other component parts or members, and it and its component parts have frequently declared boycotts, at the request of the defendants, against the business and product of various hat manufacturers, and have vigorously prosecuted the same by and through the powerful machinery at their command as aforesaid, in carrying out their general scheme herein stated, to the great damage and loss of business of said manufacturers, and particularly during the years of 1901 and 1902, they declared, prosecuted and waged, at the request of the defendants and their agents, a boycott against the hats made by and the business of H. H. Roelofs & Co., of Philadelphia, Pa., until, by causing them great damage and loss of business, they coerced them into yielding to the demand of the defendants and their agents, by the said factory of said Roelofs & Co. be unionized, as termed by the defendants, and into agreeing to employ, and employing exclusively, members of their said combination in the making and finishing departments of said factory, and in large measure surrendering to the defendants and their agents the control of said factory and business, all of which was well known to the plaintiffs, their customers, wholesale dealers and the public, and was, by the defendants and their agents, widely proclaimed through all their agencies above mentioned, in connection with their acts against the plaintiffs, as hereinafter set forth, for the purpose of intimidating and coercing said wholesale dealers and their customers from buying the hats of the plaintiffs, by creating in their minds the fear that the defendants would invoke and put into operation against them, all said powerful means, measures and machinery, if they should handle the hats of the plaintiffs.

"16. The defendants, together with the other persons united with them in said combination, known as The United Hatters of North America, have been for many years, and now are, engaged in a combined scheme and effort to force all manufacturers of fur hats in the United States, including the plaintiffs, against their will and their previous policy of carrying on their business, to organize their workmen in the departments of making and finishing, in each of their fac-

## Opinion of the Court.

[290] 7. "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in [291] which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sus-

tories, into an organization, to be part and parcel of the said combination known as The United Hatters of North America, or as the defendants and their confederates term it, to unionize their shops, with the intent thereby to control the employment of labor in and the operation of said factories, and to subject the same to the direction and control of persons, other than the owners of the same, in a manner extremely onerous and distasteful to such owners, and to carry out such scheme, effort and purpose, by restraining and destroying the interstate trade and commerce of such manufacturers, by means of intimidation of and threats made to such manufacturers and their customers in the several States, of boycotting them, their product and their customers, using therefor all the powerful means at their command as aforesaid, until such time as from the damage and loss of business resulting therefrom, the said manufacturers should yield to the said demand to unionize their factories.

"17. The defendants and other members of said United Hatters of North America, acting with them and in pursuance of said general combined scheme and purpose, and in carrying the same into effect against said manufacturers, including the plaintiffs, and by use of the means above stated, and the fear thereof, have within a very few years, forced the following named manufacturers of hats in the United States to yield to their demand, and unionize their factories, viz.: [Here follow 70 names of corporations and individuals.] and until there remained, according to the statements of the defendants, only twelve hat factories in the United States which had not submitted to their said demands, and the defendants, in pursuing their warfare against the plaintiffs, as hereinafter set forth, and in connection with their said acts against them, have made public announcement of that fact and of the firms so coerced by them, in order thereby to increase the effectiveness of their acts in intimidating said wholesale dealers and their customers in States other than Connecticut, from buying hats from plaintiffs, as hereinafter set forth.

"18. To carry out said scheme and purpose, the defendants have appointed and employed and do steadily employ, certain special agents to act in their behalf, with full and express authority from them and the other members of said combination, and under explicit instructions from them, to use every means in their power, to compel all such manufacturers of hats to so unionize their factories, and each and all of the defendants in this suit did the several acts hereinafter

## Opinion of the Court.

tained, and the costs of suit, including a reasonable attorney's fee."

[292] In our opinion, the combination described in the declaration is a combination "in restraint of trade or commerce among the several States," in the sense in which those words are used in the act, and the action can be maintained accordingly.

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stated, either by themselves or their agents, by them thereto fully authorized.

"19. On or about March 1, 1901, in pursuance of said general scheme and purpose, the defendants and the other members of said combination, The United Hatters of North America, through their agents, the said John A. Moffit, Martin Lawlor, John Phillips, James P. Maher and Charles J. Barrett, who acted for themselves and the other defendants, demanded of the plaintiffs that they should unionize their said factory, in the making and finishing departments, and also thereby acquire the right to use and use the said union label, subject to the right of the defendants to recall the same at pleasure, in all hats made by them, and then notified the plaintiffs that if they failed to yield to said demand, the defendants and all the other members of the said combination known as The United Hatters of North America, would resort to their said usual and well-known methods to compel them so to do. After several conferences, and in April, 1901, the plaintiffs replied to the said demand of the defendants as follows:

'Firmly believing that we are acting for the best interests of our firm, for the best interests of those whom we employ, and for the best interests of Danbury, by operating an independent or open factory, we hereby notify you that we decline to have our shop unionized, and if attacked, shall use all lawful means to protect our business interests.'

"The plaintiffs were then employing many union and non-union men, and their said factory was running smoothly and satisfactory both to the plaintiffs and their employees. The defendants, their confederates and agents, deferred the execution of their said threat against the plaintiffs until the conclusion of their attack made in pursuance of the same general scheme and purpose against H. H. Roelofs & Co., which resulted in the surrender of Roelofs & Co. on July 15, 1902, except that the defendants, their confederates and agents, in November, 1901, caused the said American Federation of Labor to declare a boycott against any dealer or dealers who should handle the products of the plaintiffs.

"20. On or about July 25, 1902, the defendants individually and collectively, and as members of said combinations and associations, and with other persons whose names are unknown to the plaintiffs, associated with them, in pursuance of the general scheme and purpose

## Opinion of the Court.

[293] And that conclusion rests on many judgments of this court, to the effect that the act prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the States, or restricts, in that regard, the liberty of a trader to engage in business.

aforesaid, to force all manufacturers of fur hats, and particularly the plaintiffs, to so unionize their factories, wantonly, wrongfully, maliciously, unlawfully and in violation of the provisions of the 'Act of Congress, approved July 2, 1890,' and entitled 'An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies,' and with intent to injure the property and business of the plaintiffs by means of acts done which are forbidden and declared to be unlawful, by said act of Congress, entered into a combination and conspiracy to restrain the plaintiffs and their customers in States other than Connecticut, in carrying on said trade and commerce among the several States and to wholly prevent them from engaging in and carrying on said trade and commerce between them and to prevent the plaintiffs from selling their hats to wholesale dealers and purchasers in said States other than Connecticut, and to prevent said dealers and customers in said other States from buying the same, and to prevent the plaintiffs from obtaining orders for their hats from such customers, and filling the same, and shipping said hats to said customers in said States as aforesaid, and thereby injure the plaintiffs in their property and business and to render unsalable the product and output of their said factory, so the subject of interstate commerce, in whosoever's hands the same might be or come, through said interstate trade and commerce, and to employ as means to carry out said combination and conspiracy and the purposes thereof, and accomplish the same, the following measures and acts, viz:

"To cause, by means of threats and coercion, and without warning or information to the plaintiffs, the concerted and simultaneous withdrawal of all the makers and finishers of hats then working for them, who were not members of their said combination, The United Hatters of North America, as well as those who were such members, and thereby cripple the operation of the plaintiffs' factory, and prevent the plaintiffs from filling a large number of orders then on hand, from such wholesale dealers in States other than Connecticut, which they had engaged to fill and were then in the act of filling, as was well known to the defendants; in connection therewith to declare a boycott against all hats made for sale and sold and delivered, or to be sold or delivered, by the plaintiffs to said wholesale dealers in States other than Connecticut, and to actively boycott the same and the business of those who should deal in them, and thereby prevent the sale of the same by those in whose hands they might be or come through said interstate trade in said several States; to procure and cause others of said combinations united with them in said American Feder-

## Opinion of the Court.

[294] The combination charged falls within the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes; and there is no doubt [295] that (to quote from the well-known

ation of Labor, in like manner to declare a boycott against and to actively boycott the same and the business of such wholesale dealers as should buy or sell them, and of those who should purchase them from such wholesale dealers; to intimidate such wholesale dealers from purchasing or dealing in the hats of the plaintiff by informing them that the American Federation of Labor had declared a boycott against the product of the plaintiffs and against any dealer who should handle it, and that the same was to be actively pressed against them, and by distributing circulars containing notices that such dealers and their customers were to be boycotted; to threaten with a boycott those customers who should buy any goods whatever, even though union made, of such boycotted dealers, and at the same time to notify such wholesale dealers that they were at liberty to deal in the hats of any other non-union manufacturer of similar quality to those made by the plaintiffs, but must not deal in the hats made by the plaintiffs under threats of such boycotting; to falsely represent to said wholesale dealers and their customers, that the plaintiffs had discriminated against the union men in their employ, had thrown them out of employment because they refused to give up their union cards and teach boys, who were intended to take their places after seven months' instruction, and had driven their employees to extreme measures 'by their persistent, unfair and un-American policy of antagonizing union labor, forcing wages to a starvation scale, and given boys and cheap, unskilled foreign labor preference over experienced and capable union workmen,' in order to intimidate said dealers from purchasing said hats by reason of the prejudice thereby created against the plaintiffs and the hats made by them among those who might otherwise purchase them; to use the said union label of said The United Hatters of North America as an instrument to aid them in carrying out said conspiracy and combination against the plaintiffs' and their customers' intertrade aforesaid, and in connection with the boycotting above mentioned, for the purpose of describing and identifying the hats of the plaintiffs, and singling them out to be so boycotted; to employ a large number of agents to visit said wholesale dealers and their customers, at their several places of business, and threaten them with loss of business if they should buy or handle the hats of the plaintiffs, and thereby prevent them from buying said hats, and in connection therewith to cause said dealers to be waited upon by committees representing large combinations of persons in their several localities to make similar threats to them; to use the daily press in the localities where such wholesale dealers reside, and do business,



## Opinion of the Court.

work of Chief Justice Erle on Trade Unions) "at common law every person has individually, and the public also has collectively, a right to require that the course of trade should be kept from unreasonable [296] obstruction." But the

to announce and advertise the said boycotts against the hats of the plaintiffs and said wholesale dealers, and thereby make the same more effective and oppressive, and to use the columns of their said paper, *The Journal of the United Hatters of North America*, for that purpose, and to describe the acts of their said agents in prosecuting the same.

"21. Afterwards, to wit, on July 25, 1902, and on divers days since hitherto, the defendants, in pursuance of said combination and conspiracy, and to carry the same into effect, did cause the concerted and simultaneous withdrawal, by means of threats and coercion made by them, and without previous warning or information thereof to the plaintiffs, of all but ten of the non-union makers and finishers of hats then working for them, as well as all of their union makers and finishers, leaving large numbers of hats in an unfinished and perishable condition, with intent to cripple and did thereby cripple the operation of the plaintiff's factory until the latter part of October, 1902, and thereby prevented the plaintiffs from filling a large number of orders then on hand from such wholesale dealers in States other than Connecticut, which they had engaged to fill and were then in the act of filling, as well known to the defendants, and thereby caused the loss to the plaintiffs of many orders from said wholesale dealers in other States, and greatly hindered and delayed them in filling such orders, and falsely representing to said wholesale dealers, their customers, and the public generally in States other than Connecticut, that the plaintiffs had discriminated against the union men in their employ, and had discharged or thrown out of employment their union men in August, 1902; that they had driven their employees to extreme measures by their persistent, unfair and un-American policy of antagonizing union labor, forcing wages down to a starvation scale and giving boys and cheap, unskilled foreign labor preference over experienced and capable workmen; that skilled hatters had been discharged from said factory for no other cause than their devotion and adherence to the principles of organized labor in refusing to give up their union cards, and to teach the trade to boys who were intended to take the place of union workmen after seven months' instruction, and that unable to submit longer to a system of petty tyrannies that might be tolerated in Siberia but could not be borne by independent Americans, the workmen in the factory inaugurated the strike to compel the firm to recognize their rights, in order to prejudice, and did thereby prejudice the public, against the plaintiffs and their product, and in order to intimidate, and did thereby intimidate said wholesale dealers and their customers, in States other than Connecticut, from purchasing hats from the plaintiffs by reason of the fear of the prejudice created

## Opinion of the Court.

objection here is to the jurisdiction, because, even conceding that the declaration states a case good at common law, it is contended that it does not state one within the statute. Thus, it is said, that the restraint alleged would operate to entirely

against said hats; and in connection therewith declared a boycott against all hats made for and so sold and delivered, and to be so sold and delivered to said wholesale dealers, in States other than Connecticut, and actively boycotted the same and the business of those who dealt in them in such other States, and thereby restrained and prevented the purchase of the same from the plaintiffs, and the sale of the same by those in whose hands they were, or might thereafter be, in the course of such interstate trade, and caused and procured others of said combinations united with them in the said American Federation of Labor to declare a boycott against the plaintiffs, their product and against the business of such wholesale dealers in States other than Connecticut, as should buy or sell them, and of those who should purchase from such wholesale dealers any goods whatever, and further intimidated said wholesale dealers from purchasing or dealing in hats made by the plaintiffs, as aforesaid, by informing them that the American Federation of Labor had declared a boycott against the hats of the plaintiffs and against any dealer who should handle them, and that said boycott was to be actively pressed against them, and by sending agents and committees from various of said labor organizations, to threaten said wholesale dealers and their customers with a boycott from them if they purchased or handled the goods of plaintiffs, and by distributing in San Francisco, California, and other places, circulars containing notices that such dealers, and their customers were to be boycotted, and threatened with a boycott, and did actively boycott the customers who did or should buy any goods whatever, even though union made, of such wholesale dealers so boycotted, and used the daily press to advertise and announce said boycott and the measures taken in pursuance thereof by said labor organizations, particularly The San Francisco Bulletin, in its issues of July 2 and July 4, 1903, and a daily paper published in Richmond, Virginia, on December 10, 1902, and notified such wholesale dealers in States other than Connecticut, that they were at liberty to deal in the hats of any other non-union hat manufacturer of similar quality to those of the plaintiffs, but they must not deal in hats made by the plaintiffs, under threats of being boycotted for so doing, and used the said union label of the United Hatters of North America as an instrument to aid them in carrying out said combination and conspiracy against the plaintiffs' and their customers' interstate trade, as aforesaid, and in connection with such boycotting by using the same and its absence from the hats of the plaintiffs, as an insignia or device to indicate to the purchaser that the hats of the plaintiffs were to be boycotted, and to point them out for that purpose, and employed a large number of agents to visit said wholesale dealers and their customers at their several places of

## Opinion of the Court.

destroy plaintiffs' business and thereby include intrastate trade as well; that physical obstruc[297]tion is not alleged as contemplated; and that defendants are not themselves engaged in interstate trade.

We think none of these objections are tenable, and that they are disposed of by previous decisions of this court.

business in each of said States, particularly Philadelphia and other places in the State of Pennsylvania, in Baltimore in the State of Maryland, in Richmond and other places in the State of Virginia, and in San Francisco and other places in the State of California, to intimidate and threaten them, if they should continue to deal in or handle the hats of the plaintiffs, and among many other instances of like kind, the said William C. Hennelly and Daniel P. Kelly in behalf of all said defendants, and acting for them, demanded the firm of Triest & Co., wholesale dealers in hats, doing business in said San Francisco, that they should agree not to buy or deal in the hats made by the plaintiffs, under threats made by them to said firm of boycotting their business and that of their customers, and upon their refusing to comply with such demand and yield to such threats, the defendants by their said agents caused announcement to be made in the newspapers of said city that said Triest & Co. were to be boycotted therefor, and that the labor council of San Francisco would be addressed by them for that purpose, and that they had procured a boycott to be declared by said labor council, and thereupon the defendants, through their said agents, Hennelly and Kelly, printed, published, issued, and distributed to the retail dealers in hats, in several States upon the Pacific coast, the following circular, to wit:

“ ‘ San Francisco Labor Council,  
 “ ‘ Affiliated with the American Federation of Labor,  
 “ ‘ Secretary's Office, 927 Market Street,  
 “ ‘ Rooms 405, 406, 407 Emma Spreckel's Building,  
 “ ‘ Meets every Friday, at 1159 Mission St.  
 “ ‘ Telephone South 447.  
 “ ‘ Address all communications to 927 Market Street.  
 “ ‘ San Francisco, July 3, 1903.

“ ‘ To whom it may concern:

“ ‘ At a special meeting of the San Francisco Labor Council held on the above date, the hat jobbing concern known as Triest & Co., 116 Sansome St., San Francisco, was declared unfair for persistently patronizing the unfair hat manufacturing concern of D. E. Loewe & Co., Danbury, Connecticut, where the union hatters have been on strike, for union conditions, since August 20, 1902. Triest & Co. will be retained on the unfair list as long as they handle the product of this unfair hat manufacturing concern. Union men do not usually patronize retail stores who buy from unfair jobbing houses or manufacturers. Under these circumstances, all friends of organized labor,

## Opinion of the Court.

*United States v. Trans-Missouri Freight Association*, 166 U. S. 290; *United States v. Joint Traffic Association*, 171 U. S. 505; and *Northern Securities Company v. United States*, 193 U. S. 197, hold in effect that the Anti-Trust law has a broader application than the prohibition of restraints of trade unlawful at common law. Thus in the *Trans-Missouri*

and those desiring the patronage of organized workers, will not buy goods from Triest & Co., 116 Sansome St., San Francisco.

"Yours respectfully,

G. B. BENHAM,

"President S. F. Labor Council.

"T. E. ZANT,

"Secretary S. F. Labor Council. [L. s.]

"W. C. HENNELLY,

"D. F. KELLY,

"Representing United Hatters of North America."

"Also the following, to wit:

"San Francisco Labor Council,

"Affiliated with the American Federation of Labor,

"Secretary's Office, 927 Market Street,

"Rooms 405, 406, 407 Emma Spreckel's Building,

"Meets every Friday, at 1159 Mission St.

"Telephone South 447.

"Address all communications to 927 Market Street.

"San Francisco, July 14, 1903.

"Messrs. \_\_\_\_\_,

"Gentlemen: We beg leave to call your attention to the following products which are on the unfair list of the American Federation of Labor.

"We do this in order that you refrain from handling these goods, as the patronage of the firms named below is taken by the organized workers as an evidence of a desire to patronize those who are opposed to the interests of organized labor. The declaration of unfairness regarding the firms mentioned is fully sanctioned and will be supported to the fullest degree by the San Francisco Labor Council.

"Trusting that you will be able to avoid the handling of these goods in the future, we are,

"Yours respectfully.

G. B. BENHAM, *President*.

"T. E. ZANT, *Secretary*. [L. s.]

## Unfair List.

"Loewe & Co., Danbury, Conn., and Triest & Co., 116 Sansome St., San Francisco, Hat Manufacturers;

"Cluett, Peabody & Co., Shirts and Collars, Troy, New York, and 562 Mission St., San Francisco, Cal.;

## Opinion of the Court.

*Case*, 166 U. S. 290, it was said that, "assuming that agreements of this nature are not void at common law, and that the various cases cited by the learned courts below show it, the answer to the statement of their validity is to be found in the terms of the statute under consideration;" and in the *Northern Securities Case*, 193 U. S. 331, that, "the act declares illegal every contract, combination or conspiracy, in whatever form, of whatever nature, and whoever may be the parties to it, which directly or necessarily operates in restraint of trade or commerce among the several States."

We do not pause to comment on cases such as *United States v. Knight*, 156 U. S. 1; *Hopkins v. United States*, 171 U. S. 578; and *Anderson v. United States*, 171 U. S. 604; in which the undisputed facts showed that the purpose of the agreement was not to obstruct or restrain interstate commerce. The object and intention of the combination determined its legality.

In *Swift v. United States*, 196 U. S. 375, a bill was brought against a number of corporations, firms and individuals of different States, alleging that they were engaged in interstate commerce in the purchase, sale, transportation and delivery,

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" 'United Shirt and Collar Co., Troy, New York, and 25 Sansome St., San Francisco, Cal.;

" 'Van Zandt, Jacobs & Co., Troy, New York; Greenbaum, Weil & Michaels, Selling Agents, 27 Sansome St., San Francisco, Cal.'

"and cause said circulars to be mailed to and personally delivered to the retail dealers in hats, and the other customers of said Triest & Co., upon the Pacific coast, and to many others, thereby causing the loss of many orders and customers to said Triest & Co., and to the plaintiffs, for the purpose of intimidating and coercing said Triest & Co. not to deal with the plaintiffs, and thereby cause the loss of many orders and customers to said Triest & Co., and to the plaintiffs.

"22. By means of each and all of said acts done by the defendants in pursuance of said combination and conspiracy, they have greatly restrained, diminished, and, in many places, destroyed the trade and commerce of the plaintiffs with said wholesale dealers, in said States other than Connecticut, by the loss of many orders and customers directly resulting therefrom, and the plaintiffs have been injured in their business and property by reason of said combination and conspiracy, and the acts of the defendants done in pursuance thereof, and to carry the same into effect, which are declared to be unlawful by said act of Congress, to the amount of eighty thousand (\$80,000) dollars, to recover threefold which damages, under section 7 of said act this suit is brought."

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and subsequent resale at the point of delivery, of meats; and that they combined to refrain from bidding against each other in the purchase of cattle; to maintain a uniform price at which the meat should be sold; and to maintain uniform charges in delivery meats thus sold through the channels of interstate trade to the various dealers and consumers in other States. [298] And that thus they artificially restrained commerce in fresh meats from the purchase and shipment of live stock from the plains to the final distribution of the meats to the consumers in the markets of the country.

Mr. Justice Holmes, speaking for the court, said (pp. 395, 396, 398) :

"Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce.

\* \* \* \* \*

"The general objection is urged that the bill does not set forth sufficient definite or specific facts. This objection is serious, but it seems to us inherent in the nature of the case. The scheme alleged is so vast that it presents a new problem in pleading. If, as we must assume, the scheme is entertained, it is, of course, contrary to the very words of the statute. Its size makes the violation of the law more conspicuous, and yet the same thing makes it impossible to fasten the principal fact to a certain time and place. The elements, too, are so numerous and shifting, even the constituent parts alleged are and from their nature must be so extensive in time and space, that something of the same impossibility applies to them.

\* \* \* \* \*

"The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges, they are alleged sufficiently as elements of a scheme. It is [299] suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as parts of a single plan. The plan may make the parts unlawful."

And the same principle was expressed in *Aikens v. Wisconsin*, 195 U. S. 194, 205, involving a statute of Wisconsin pro-

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hibiting combinations "for the purpose of wilfully or maliciously injuring another in his reputation, trade, business or profession by any means whatever," etc., in which Mr. Justice Holmes said:

"The statute is directed against a series of acts, and acts of several, the acts of combining, with intent to do other acts, 'The very plot is an act in itself.' *Mulcahy v. The Queen*, L. R. 3 H. L. 306, 317. But an act, which in itself is merely a voluntary muscular contraction, derives all its character from the consequences which will follow it under the circumstances in which it was done. When the acts consist of making a combination calculated to cause temporal damage, the power to punish such acts, when done maliciously, cannot be denied because they are to be followed and worked out by conduct which might have been lawful if not preceded by the acts. No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law."

In *Addyston Pipe and Steel Company v. United States*, 175 U. S. 211, the petition alleged that the defendants were practically the only manufacturers of cast iron within thirty-six States and Territories, that they had entered into a combination by which they agreed not to compete with each other in the sale of pipe, and the territory through which the constituent companies could make sales was allotted between them. This court held that the agreement which, prior to any act of transportation, limited the prices at which the pipe could be [300] sold after transportation, was within the law. Mr. Justice Peckham, delivering the opinion, said (p. 242): "And when Congress has enacted a statute such as the one in question, any agreement or combination which directly operates not alone upon the manufacture but upon the sale, transportation and delivery of an article of interstate commerce, by preventing or restricting its sale, etc., thereby regulates interstate commerce."

In *Montague & Company v. Lowry*, 193 U. S. 38, which was an action brought by a private citizen under § 7 against a combination engaged in the manufacture of tiles, defendants were wholesale dealers in tiles in California and combined with manufacturers in other States to restrain the interstate traffic in tiles by refusing to sell any tiles to any

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wholesale dealer in California who was not a member of the association except at a prohibitive rate. The case was a commercial boycott against such dealers in California as would not or could not obtain membership in the association. The restraint did not consist in a physical obstruction of interstate commerce, but in the fact that the plaintiff and other independent dealers could not purchase their tiles from manufacturers in other States because such manufacturers had combined to boycott them. This court held that this obstruction to the purchase of tiles, a fact antecedent to physical transportation, was within the prohibition of the act. Mr. Justice Peckham, speaking for the court, said (p. 45), concerning the agreement, that it "restrained trade, for it narrowed the market for the sale of tiles in California from the manufacturers and dealers therein in other States, so that they could only be sold to the members of the association, and it enhanced prices to the non-member."

The averments here are that there was an existing interstate traffic between plaintiffs and citizens of other States, and that for the direct purpose of destroying such interstate traffic defendants combined not merely to prevent plaintiffs from manufacturing articles then and there intended for transportation beyond the State, but also to prevent the vendees from reselling the hats which they had imported from Connecticut, or from [301] further negotiating with plaintiffs for the purchase and intertransportation of such hats from Connecticut to the various places of destination. So that, although some of the means whereby the interstate traffic was to be destroyed were acts within a State, and some of them were in themselves as a part of their obvious purpose and effect beyond the scope of Federal authority, still, as we have seen, the acts must be considered as a whole, and the plan is open to condemnation, notwithstanding a negligible amount of intrastate business might be affected in carrying it out. If the purposes of the combination were, as alleged, to prevent any interstate transportation at all, the fact that the means operated at one end before physical transportation commenced and at the other end after the physical transportation ended was immaterial.



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Nor can the act in question be held inapplicable because defendants were not themselves engaged in interstate commerce. The act made no distinction between classes. It provided that "every" contract, combination or conspiracy in restraint of trade was illegal. The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act and that all these efforts failed, so that the act remained as we have it before us.

In an early case, *United States v. Workingmen's Amalgamated Council*, 54 Fed. Rep. 994, the United States filed a bill under the Sherman act in the Circuit Court for the Eastern District of Louisiana, averring the existence of "a gigantic and widespread combination of the members of a multitude of separate organizations for the purpose of restraining the commerce among the several States and with foreign countries," and it was contended that the statute did not refer to combinations of laborers. But the court, granting the injunction, said:

"I think the Congressional debates show that the statute had its origin in the evils of massed capital; but, when the Congress came to formulating the prohibition, which is the yardstick for measuring the complainant's right to the injunction, [302] it expressed it in these words: 'Every contract or combination in the form of trust, or otherwise in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal.' The subject had so broadened in the minds of the legislators that the source of the evil was not regarded as material, and the evil in its entirety is dealt with. They made the interdiction include combinations of labor, as well as of capital; in fact, all combinations in restraint of commerce, without reference to the character of the persons who entered into them. It is true this statute has not been much expounded by judges, but, it seems to me, its meaning, as far as relates to the sort of combinations to which it is to apply, is manifest, and that it includes combinations which are composed of laborers acting in the interest of laborers.

• • • • •

"It is the successful effort of the combination of the defendants to intimidate and overawe others who were at work in conducting or carrying on the commerce of the country, in which the court finds their error and their violation of the statute. One of the intended results of their combined action was the forced stagnation of all the commerce which flowed through New Orleans. This intent and com-

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bined action are none the less unlawful because they included in their scope the paralysis of all other business within the city as well."

The case was affirmed on appeal by the Circuit Court of Appeals for the Fifth Circuit. 57 Fed. Rep. 85.

Subsequently came the litigation over the Pullman strike and the decisions *In re Debs*, 64 Fed. Rep. 724, 745, 755; 158 U. S. 564. The bill in that case was filed by the United States against the officers of the American Railway Union, which alleged that a labor dispute existed between the Pullman Palace Car Company and its employees; that thereafter the four officers of the railway union combined together and with others to compel an adjustment of such dispute by creating a boycott against the cars of the car company; that to make such boycott effective they had already prevented certain of the railroads running out of Chicago from operating their trains; that they asserted that they could and would tie up, paralyze and break down any and every railroad which did not accede to their demands, and that the purpose and intention of the combination was "to secure unto themselves the entire control of the interstate, industrial and commercial business in which the population of the city of Chicago and of other communities along the lines of road of said railways are engaged with each other, and to restrain any and all other persons from any independent control or management of such interstate, industrial or commercial enterprises, save according to the will and with the consent of the defendants."

The Circuit Court proceeded principally upon the Sherman Anti-Trust Law, and granted an injunction. In this court the case was rested upon the broader ground that the Federal Government had full power over interstate commerce and over the transmission of the mails, and in the exercise of those powers could remove everything put upon highways, natural or artificial, to obstruct the passage of interstate commerce, or the carrying of the mails. But in reference to the Anti-Trust Act the court expressly stated (158 U. S. 600):

"We enter into no examination of the act of July 2, 1890, c. 647, 26 Stat. 209, upon which the Circuit Court relied mainly to sustain

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its jurisdiction. It must not be understood from this that we dissent from the conclusions of that court in reference to the scope of the act, but simply that we prefer to rest our judgment on the broader ground which has been discussed in this opinion, believing it of importance that the principles underlying it should be fully stated and affirmed."

And in the opinion, Mr. Justice Brewer, among other things, said (p. 581):

"It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this court the question presented was of the validity of state legislation in its bearings upon interstate commerce, and the uniform course of decision has been to declare that it is not within [§04] the competency of a State to legislate in such a manner as to obstruct interstate commerce. If a State, with its recognized powers of sovereignty, is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?

The question answers itself, and in the light of the authorities the only inquiry is as to the sufficiency of the averments of fact. We have given the declaration in full in the margin, and it appears therefrom that it is charged that the defendants formed a combination to directly restrain plaintiffs' trade; that the trade to be restrained was interstate; that certain means to attain such restraint were contrived to be used and employed to that end; that those means were so used and employed by defendants, and that thereby they injured plaintiffs' property and business.

At the risk of tediousness, we repeat that the complaint averred that plaintiffs were manufacturers of hats in Danbury, Connecticut, having a factory there, and were then and there engaged in an interstate trade in some twenty States other than the State of Connecticut; that they were practically dependent upon such interstate trade to consume the product of their factory, only a small percentage of their entire output being consumed in the State of Connecticut; that at the time the alleged combination was formed they were in the process of manufacturing a large number of hats for the purpose of fulfilling engagements then actually made with consignees and wholesale dealers in States other than Connecticut, and that if prevented from carrying on the work of manufacturing these hats they would be unable to complete their engagements.

That defendants were members of a vast combination called The United Hatters of North America, comprising about 9,000 members and including a large number of subordinate unions, and that they were combined with some 1,400,000 others into another association known as The American Federation of [§05] Labor, of which they were members, whose members resided in all the places in the several

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States where the wholesale dealers in hats and their customers resided and did business; that defendants were "engaged in a combined scheme and effort to force all manufacturers of fur hats in the United States, including the plaintiffs, against their will and their previous policy of carrying on their business, to organize their workmen in the departments of making and finishing, in each of their factories, into an organization, to be part and parcel of the said combination known as The United Hatters of North America, or as the defendants and their confederates term it, to unionize their shops, with the intent thereby to control the employment of labor in and the operation of said factories, and to subject the same to the direction and control of persons, other than the owners of the same, in a manner extremely onerous and distasteful to such owners, and to carry out such scheme, effort and purpose, by restraining and destroying the interstate trade and commerce of such manufacturers, by means of intimidation of and threats made to such manufacturers and their customers in the several States, of boycotting them, their product and their customers, using therefor all the powerful means at their command, as aforesaid, until such time as, from the damage and loss of business resulting therefrom, the said manufacturers should yield to the said demand to unionize their factories."

That the conspiracy or combination was so far progressed that out of eighty-two manufacturers of this country engaged in the production of fur hats seventy had accepted the terms and acceded to the demand that the shop should be conducted in accordance, so far as conditions of employment were concerned, with the will of the American Federation of Labor; that the local union demanded of plaintiffs that they should unionize their shop under peril of being boycotted by this combination, which demand defendants declined to comply with; that thereupon the American Federation of Labor, acting through its official organ and through its organizers, declared a boycott.

[306] The complaint then thus continued:

"20. On or about July 25, 1902, the defendants individually and collectively, and as members of said combinations and associations, and with other persons whose names are unknown to the plaintiffs, associated with them, in pursuance of the general scheme and purpose aforesaid, to force all manufacturers of fur hats, and particularly the plaintiffs, to so unionize their factories, wantonly, wrongfully, maliciously, unlawfully and in violation of the provisions of the 'Act of Congress, approved July 2, 1890,' and entitled 'An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies,' and with intent to injure the property and business of the

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plaintiffs by means of acts done which are forbidden and declared to be unlawful, by said act of Congress, entered into a combination and conspiracy to restrain the plaintiffs and their customers in States other than Connecticut, in carrying on said trade and commerce among the several States, and to wholly prevent them from engaging in and carrying on said trade and commerce between them and to prevent the plaintiffs from selling their hats to wholesale dealers and purchasers in said States other than Connecticut, and to prevent said dealers and customers in said other States from buying the same, and to prevent the plaintiffs from obtaining orders for their hats from such customers, and filling the same, and shipping said hats to said customers in said States as aforesaid, and thereby injure the plaintiffs in their property and business and to render unsalable the product and output of their said factory, so the subject of interstate commerce, in whosoever's hands the same might be or come, through said interstate trade and commerce, and to employ as means to carry out said combination and conspiracy and the purposes thereof, and accomplish the same, the following measures and acts, viz:

"To cause, by means of threats and coercion, and without warning or information to the plaintiffs, the concerted and simultaneous withdrawal of all the makers and finishers of hats then working for them, who were not members of their said [307] combination, The United Hatters of North America, as well as those who were such members, and thereby cripple the operation of the plaintiffs' factory, and prevent the plaintiffs from filling a large number of orders then on hand, from such wholesale dealers in States other than Connecticut, which they had engaged to fill and were then in the act of filling, as was well known to the defendants; in connection therewith to declare a boycott against all hats made for sale and sold and delivered, or to be so sold or delivered, by the plaintiffs to said wholesale dealers in States other than Connecticut, and to actively boycott the same and the business of those who should deal in them, and thereby prevent the sale of the same by those in whose hands they might be or come through said interstate trade in said several States; to procure and cause others of said combinations united with them in said American Federation of Labor, in like manner to declare a boycott against and to actively boycott the same and the business of such wholesale dealers as should buy or sell them, and of those who should purchase them from such wholesale dealers; to intimidate such wholesale dealers from purchasing or dealing in the hats of the plaintiffs by informing them that the American Federation of Labor had declared a boycott against the product of the plaintiffs and against any dealer who should handle it, and that the same was to be actively pressed against them, and by distributing circulars containing notices that such dealers and their customers were to be boycotted; to threaten with a boycott those customers who should buy any goods whatever, even though union made, of such boycotted dealers, and at the same time

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to notify such wholesale dealers that they were at liberty to deal in the hats of any other non-union manufacturer of similar quality to those made by the plaintiffs, but must not deal in the hats made by the plaintiffs under threats of such boycotting; to falsely represent to said wholesale dealers and their customers, that the plaintiffs had discriminated against the union men in their employ, had thrown them out of employment because they refused to give up their union cards and [308] teach boys, who were intended to take their places after seven months' instruction, and had driven their employees to extreme measures 'by their persistent, unfair and un-American policy of antagonizing union labor, forcing wages to a starvation scale, and given boys and cheap, unskilled foreign labor preference over experienced and capable union workmen,' in order to intimidate said dealers from purchasing said hats by reason of the prejudice thereby created against the plaintiffs and the hats made by them among those who might otherwise purchase them; to use the said union label of said The United Hatters of North America as an instrument to aid them in carrying out said conspiracy and combination against the plaintiffs' and their customers' interstate trade aforesaid, and in connection with the boycotting above mentioned, for the purpose of describing and identifying the hats of the plaintiffs and singling them out to be so boycotted; to employ a large number of agents to visit said wholesale dealers and their customers, at their several places of business, and threaten them with loss of business if they should buy or handle the hats of the plaintiffs, and thereby prevent them from buying said hats, and in connection therewith to cause said dealers to be waited upon by committees representing large combinations of persons in their several localities to make similar threats to them; to use the daily press in the localities where such wholesale dealers reside, and do business, to announce and advertise the said boycotts against the hats of the plaintiffs and said wholesale dealers, and thereby make the same more effective and oppressive, and to use the columns of their said paper, The Journal of the United Hatters of North America, for that purpose, and to describe the acts of their said agents in prosecuting the same."

And then followed the averments that the defendants proceeded to carry out their combination to restrain and destroy interstate trade and commerce between plaintiffs and their customers in other States by employing the identical means contrived for that purpose; and that by reason of those acts [309] plaintiffs were damaged in their business and property in some \$80,000.

We think a case within the statute was set up and that the demurrer should have been overruled.

Judgment reversed and cause remanded with a direction to proceed accordingly.

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**[423] SHAWNEE COMPRESS COMPANY v. ANDERSON.\***

(Appeal from the Supreme Court of the Territory of Oklahoma.)

[209 U. S. 423.]

No. 140. Argued March 2, 3, 1908.—Decided April 13, 1908.

Where the Supreme Court of the Territory of Oklahoma reverses the judgment of the trial court, the reviewing power of this court is limited to determining whether there was evidence supporting the findings and whether the facts found were adequate to sustain the legal conclusions.<sup>b</sup>

In this case, the Supreme Court of the Territory having found that a lease, being made to further an unlawful enterprise, was void as an unreasonable restraint of trade and as against public policy, this court sustains the judgment, there being proof supporting the conclusions to the effect that the lessor company agreed to go out of the field of competition, not to enter that field again, and to render every assistance to prevent others from entering it—other acts in aid of a scheme of monopoly also being proved.

It is not necessary to determine whether the Supreme Court of the Territory based its judgment declaring such a lease void on the common law, the Sherman law, or the statutes of the Territory; the restraint placed upon the lessor was greater than the protection of the lessee required.

17 Oklahoma, 231, affirmed.

This suit was brought in the District Court of the county of Lincoln, Territory of Oklahoma, by appellees as stockholders of the Shawnee Compress Company against appellants, to cancel a lease made by the Shawnee Compress Company to the Gulf Compress Company.

The original petition alleged that the compress companies were respectively corporations of Oklahoma and the State of Alabama; that the plaintiffs, appellees here, were minority stockholders of the Shawnee Company; that certain of the stockholders of the Shawnee Company, claiming to be its officers, "conceived the idea of leasing the entire property and business of said company, together with its good will

\* For opinion of Supreme Court of Arizona (87 Pac. Rep. 315) see, *ante*, p. 122.

<sup>b</sup> Syllabus and statements of arguments copyrighted, 1908, by The Banks Law Publishing Co.

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and the right to the business thereof to said defendant, Gulf Compress Company, a foreign corporation;" that subsequently the [424] same stockholders, claiming to be the directors of the corporation in certain meetings and by certain resolutions, executed the purpose. These meetings were alleged to be invalid as not being in conformity with the by-laws, and that the proceedings therein were "wholly illegal and beyond the powers and authority of the said stockholders and directors of said corporation;" that the corporation was organized to construct and operate a cotton compress in the city of Shawnee, and that its officers and stockholders were not authorized to execute a lease for a period of years, vesting in another and foreign corporation, the rights, duties and business of the company, and that the lease was void as against the rights of plaintiffs, being minority stockholders of the company. A copy of the lease was attached to the petition.

The petition was amended, making the allegations somewhat fuller, and alleged that appellants Stubbs and Beatty, who assumed to act respectively as president and secretary of the company, and certain other stockholders who joined with them in the negotiation of the lease, were induced thereto by certain advantages personal to themselves and not by the interest of the company. It was also alleged that the "exigencies of the business" of the company did not demand or justify the lease, and that its revenues for the season 1904-1905, over and above taxes and insurance, notwithstanding negligent and incompetent management, were \$7,485.89; and, plaintiffs expressed the belief, could be made greater for the year covered by the lease. It was alleged that the Gulf Compress Company was in the business of leasing and operating competing compresses for the purpose of monopolizing, as far as possible, the business of compressing cotton in a large portion, if not all, the cotton-raising districts of the United States, and that the lease was procured from the Shawnee Company in pursuance of said scheme, and other leases of other compresses were also secured for like purposes, and that the Gulf Company is in its operation and method of conducting business a trust, combine and conspiracy, in re-



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straint of trade [425] and commerce, in violation of the Federal Anti-Trust Law and the anti-trust law of the Territory of Oklahoma, and that it is the design of the Gulf Compress Company to increase the charge of compressing cotton, and that it will be able to enforce such charges by reason of the fact that it will control all of the compresses in the Territory.

There was a demurrer to the petition, which was overruled. An answer was then filed, which in detail asserted the validity of the proceedings preceding the execution of the lease; that the company was indebted in the sum of \$17,250—\$6,000 to the Shawnee National Bank and \$11,250 to the Webb Press Company, Limited, which was past due; that its creditors were pressing for payment, and that the lease was necessary in order to procure money by which to pay the Shawnee Bank and to secure the extension of time on the indebtedness due the Webb Press Company, and that for these reasons the negotiations for the lease were entered into and the lease finally made. And it is alleged that the consideration paid was fair and reasonable and for the best interest of the stockholders of the Shawnee Company; that defendants could procure said second mortgage money in no other way, and that the property of the Shawnee Company would have been sold at a great sacrifice unless the lease had been made.

It is alleged that appellees are firms of cotton buyers, and in order to obtain an unfair advantage over other buyers have conspired together for the purpose of forming a monopoly of all the compresses in the Territory and destroying competition in compressing, and, in order to carry out the conspiracy, have, for more than six months, endeavored to obtain a majority of the stock of the Shawnee Company, and, knowing that Beatty and Stubbs were involved and in need of money, have in all ways oppressed said Beatty and Stubbs to compel them to sell their stock to appellants for an inadequate consideration and conspired to compel the Shawnee Company, knowing it was involved and its demands pressing, to sell and convey its property to them for the inadequate consideration of \$25,000. [426] And it is

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alleged that the lease was made to defeat such conspiracy. Other plans of the appellees to harass the Shawnee Company are averred.

The case went to trial on the issues thus formed and resulted in a judgment for defendants (appellants here). The judgment recited that "the court having heard all the evidence offered \* \* \* and being fully advised in the premises finds for the defendants and against the plaintiffs that the allegations of the petition of the plaintiffs are not supported by the law and the evidence."

A motion for a new trial was denied and the case was then taken to the Supreme Court of the Territory, which court reversed the judgment of the court below, and the case was remanded to the District Court, with instructions to that court to render judgment for plaintiffs in the case (appellees here) in accordance with the opinion of the Supreme Court, and the prayer of the amended petition.

*Mr. B. B. Blakeney*, with whom *Mr. G. T. Fitzhugh* was on the brief, for appellants:

An act is not necessarily invalid because in restraint of trade, when the restriction of trade is an ancillary or incidental result.

To be condemned by the law a contract must be an agreement between the parties to restrict trade, and such contract is invalid, whatever may be the result of its operation. If a purchaser buys one or more compresses and operates them as his own property, competition is to that extent restricted, but being incidental, such contract is not invalid, and will not be held invalid because the purchaser may have taken a contract from the seller obligating the seller not to carry on or resume such business. Such provisions are usual and have been sanctioned by the courts. *Fowle et al. v. Park et al.*, 131 U. S. 88; *Gibbs v. Gas Co.*, 130 U. S. 396; *Cin., P. B. S. & P. P. Co. v. Bay et al.*, 200 U. S. 179; *United States v. Joint Traffic Association*, 171 U. S. 505; *Bement & Sons v. National Harrow Co.*, [427] 186 U. S. 70, 92; *Navigation Company v. Windsor*, 20 Wall. 64, 68; *Diamond Match Co. v. Roeber*, 106 N. Y. 473; *Tode v. Gross*, 127 N. Y. 480; *Beal v. Chase*, 31 Michigan, 490; *Hubbard v. Miller*, 27 Michigan, 15; *National*

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*Ben. Co. v. Union Hospital Co.*, 45 Minnesota, 272; *Whitney v. Slayton*, 40 Maine, 224; *Pierce v. Fuller*, 8 Massachusetts, 222; *Richards v. Seating Co.*, 87 Wisconsin, 503; *National Enameling & Co. v. Haveman*, 120 Fed. Rep. 415; *United States v. Addyston P. & S. Co.*, 29 C. C. A. 141; *S. C.*, 85 Fed. Rep. 271; *Davis v. Booth*, 131 Fed. Rep. 31, 37; *S. C.*, 127 Fed. Rep. 871; *In re Greene*, 52 Fed. Rep. 104; *Chicago, St. L. &c. Ry Co. v. Pullman*, 139 U. S. 79; *Jarvis et al. v. Knapp*, 121 Fed. Rep. 39; *Booth et al. v. Davis*, 127 Fed. Rep. 871, and cases cited; *Carter v. Alling*, 43 Fed. Rep. 208; *Harrison v. Refining Co.*, 116 Fed. Rep. 304; *State v. Shippers Compress &c. Co.*, 95 Texas, 603; *S. C.*, 69 S. W. Rep. 58.

The statutes of Oklahoma expressly authorize a contract of this character. Wilson's Revised and Annotated Statutes of Oklahoma, §§ 819, 820.

Both of these statutes were adopted from the statutes of California and have been frequently construed by the Supreme Court of that State. *Brown v. Kling*, 101 California, 295; *Gregory v. Speiker*, 110 California, 150; *Ragsdale v. Nagle*, 106 California, 332; *City Carpet Beating &c. Works v. Jones*, 102 California, 506; *Vulcan Powder Company v. Hercules Powder Company*, 96 California, 510.

Under these sections of the statute one who leases a compress and its good will may enter into a contract to refrain from carrying on a similar business within a specified county. The contract of lease in controversy limits such competition to fifty miles.

The evidence did not disclose whether a radius of fifty miles would have carried it without the boundaries of the county or not, but if fifty miles was an excessive restriction, the excess only was invalid and the restriction might be enforced within the limits of the law.

[428] Such a contract being valid could not serve as a basis for concluding that it would be against public policy by creating an unnecessary restraint of trade, preventing competition and creating a monopoly.

The court below overlooked a well recognized principle which would control in any event in the disposition of this case. If the Gulf Compress Company itself was a monopoly,

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the Shawnee Compress Company could not for that reason prevent the specific performance of a contract for sale or lease, and, *a priori*, the minority stockholders could not interpose to prevent such performance. *Trenton Pottery Co. v. Olyphant*, 51 N. J. E. 507; *Diamond Match Co. v. Roeber*, 106 N. Y. 473; *Metcalf v. American School Furniture Co.*, 122 Fed. Rep. 115-120; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 547; *Willoughby v. Chicago Junction Ry. Co.*, 50 N. J. 656.

*Mr. James R. Keaton and Mr. Andrew Wilson*, with whom *Mr. John W. Shartel, Mr. Frank Wells, and Mr. Noel W. Barksdale* were on the brief, for appellees:

The contract of lease from the Shawnee Compress Company to the Gulf Compress Company, of April 26, 1905, tended to create a combination unreasonably in restraint of trade, the prevention of competition and the establishment of a monopoly, therefore being against public policy. 26 Stat. at Large, 209, c. 647, § 3; Wilson's Statutes of Oklahoma, §§ 819, 820. The contract is illegal under the common law, also, which declares all contracts in unreasonable restraint of trade to be contrary to public policy and void.

Under the act of Congress above referred to not only contracts in unreasonable restraint of trade, but every contract in restraint of trade is condemned. See *Pocahontis Coke Co. v. Powhatan Coal &c. Co.*, 60 W. Va. 508; S. C. 56 S. E. Rep. 264; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211.

In view of the evidence, it certainly can not be said that any portion of the lease would unquestionably have been entered into regardless of the provisions for illegal restraint and hence [429] the entire contract must fall. Okla. Stat. 1893, § 810; Wilson's Ann. Stat. § 767; *Bishop v. Palmer*, 146 Massachusetts, 469; *Western Wooden-Ware Assn. v. Starkey*, 84 Michigan, 76; *Saratoga Co. Bank v. King*, 44 N. Y. 87; *Consumers' Oil Co. v. Nunnemaker*, 142 Indiana, 560; *More v. Bonnet*, 40 California, 251; *Frost v. More*, 40 California, 347.

A contract based upon several considerations, one of which is unlawful, is void. *Edwards Co. v. Jennings*, 89 Texas,

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618; *Gage v. Fisher*, 5 N. D. 297; *Collins v. Merrell* (Ky.), 2 Met. 163; *St. L. J. & Co. R. R. Co. v. Mathers*, 104 Illinois, 257.

Furthermore, these provisions, in connection with the undisputed testimony to the effect that one of his purposes in procuring the execution of said lease on behalf of the Gulf Compress Company was to prevent unreasonable or unnecessary competition, renders the entire lease contract void, under § 3 of the Sherman law which applies to trade and commerce within the Territories as well as to interstate commerce. *Northern Securities Co. v. United States*, 193 U. S. 196; *Western Wooden-Ware Association v. Starkey*, 84 Michigan, 76; *Santa Clara Val. M. & L. Co. v. Hayes*, 76 California, 387; *Pacific Factor Co. v. Adler*, 90 California, 110; *Anheuser-Busch v. Houck*, 88 Texas, 184; *State v. Distilling Co.*, 29 Nebraska, 700.

MR. JUSTICE MCKENNA, after making the foregoing statement, delivered the opinion of the court.

The Supreme Court of the Territory, in its opinion, discussed only two of the questions urged upon its consideration, to wit (1) the legal power of the Shawnee Compress Company to execute the lease; and (2) the purpose in its execution to secure a monopoly of the business of compressing cotton and to unlawfully restrict competition. Of the first the court said:

"We find no express authority to lease set out in the articles of incorporation, but we are nevertheless of the opinion the weight of authority is that when a strictly private corporation finds it can not profitably continue operations it may lawfully make a lease of its entire property for a term of years."

[430] The court cited cases, and continued (p. 238):

"It is only when such exigencies exist as necessitate or render appropriate such or similar action that the right can be exercised."

And it was observed that while there was no special finding of fact "in that regard by the trial court, yet this feature must necessarily have been considered, in the light of the evidence introduced at the trial, and the judgment based thereon."

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The court further said that it found "ample authority in the record for that action," and, following the rule "often reiterated," the court further said, "it must hold that where the record contains some evidence to support the finding of the trial court," the judgment will not be disturbed.

The ruling sustaining the power of the Shawnee Company to execute the lease is attacked by appellees, but we do not find it necessary to express an opinion upon it, on account of the view we entertain of the second proposition.

In passing on the second proposition the Supreme Court decided adversely to the view taken by the trial court. The court therefore must either have considered that there was not some evidence supporting the conclusions of fact of the trial court or must have deemed the principles of law which the trial court upheld were not sustained by its conclusion of fact. As our review, in the nature of things, is confined to determining whether the court below erred, it follows that our reviewing power under the circumstances is coincident with the authority to review possessed by the court below, and therefore we are confined, as was the court below, to determining whether there was some evidence supporting the findings and whether the facts found were adequate to sustain the legal conclusions. *Southern Pine & Lumber Co. v. Ward*, 208 U. S. 126.

The court, in its opinion, gives a summary of the pleadings and states the salient points of the lease to be that it conveys all of the property of the Shawnee Company to the Gulf Company, that the Shawnee Company covenants that it will not "directly or indirectly engage in the compressing of cotton [431] within fifty miles of any plant operated by the" Gulf Company, and that the Shawnee Company "agrees and pledges" to the Gulf Company "its good will, moral and legal support, and that it, individually and collectively, will render the 'Gulf Company' every assistance in discouraging unreasonable and unnecessary competition." And from the evidence the court deduces the following conclusions (p. 236):

"It further appears from the evidence at the trial that C. O. Hanson is the president of both the Atlanta Compress Company and the Gulf Compress Company, being a stockholder in each, and is the one who negotiated the lease in question. That the Atlanta Compress

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Company operates in the States of Alabama, Georgia and Florida, and was organized and is owned and controlled solely by the carriers for their benefit. That the board of directors and stockholders of said corporation are composed entirely of railroad officials. That the Atlanta Company controls the operation of twenty-five plants. That the Gulf Compress Company is a close corporation, chartered in Mobile, Alabama, and operating in the States of Alabama, Mississippi, Tennessee, Louisiana, Arkansas, Indian Territory and Oklahoma, and controlling the operation of twenty-seven compresses in those States, located at various points therein. That none of the Gulf Company's plants and the Atlanta Company's compresses are operated at the same points.

"It is further disclosed by the evidence that the capital stock of the Gulf Company, as originally incorporated, was \$25,000, but that it has, within the past year, been increased to one million dollars, of which \$800,000 is treasury stock. That its field of operation has been rapidly extended from Alabama to all the cotton-growing territory; that it is at the present time engaged in the purchase or leasing of compresses at various points, and, as testified to by its president, is 'prepared to buy or lease, whichever proposition suits us best.' It appears from the evidence that negotiations conducted by Mr. Hanson with Stubbs and Beatty for the lease of the Shaw[482]nee plant in pursuance of an effort to avoid, 'directly or indirectly, the possibility, if not probability, of unnecessary and unreasonable competition.'

"It is further disclosed by the testimony that the carrier pays for the compression of cotton, incorporating the cost thereof in its tariff. That tariffs for the hauling of cotton are established by the railroads as well as hauling districts or territories, within which the haul of cotton must be one way, or otherwise the higher rate, denominated the terminal rate, applies, rendering it unprofitable to ship to other than the established point in the hauling district."

And the court says that from these facts, and others referred to supporting them, it cannot be doubted that the object of the Gulf Company and its allied corporation, the Atlanta Compress Company, "is to prevent competition in compression of cotton throughout the cotton-producing States." The court declared it to be its judgment that "not only is the enterprise in which the Gulf Compress Company is engaged an unlawful one, as now conducted, but the contract in question in this case, being made to further its objects and purposes, is void on the ground that it is in unreasonable restraint of trade and against public policy."

This conclusion is the direct antithesis of that drawn by the trial court and we are brought to the inquiry, is it justified?

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The evidence cannot be given in detail, and we may say at the outset that there is no question as to its weight—we are not confronted with conflicting testimonies. This branch of the case is constituted of the lease, principally of the testimony of one witness, the president of the Gulf Company, and of facts which are not disputed. The other testimony, a great deal of which is documentary, is mostly directed to the financial condition of the Shawnee Company as the inducement of the lease and to the proceedings taken to authorize its execution. There is also testimony directed against the purpose and motives of the appellees, and some tending to show that one of the officers and stockholders of the Shawnee Company [433] had been loaned money by the president of the Gulf Company, whereby control of the Shawnee Company might be obtained and the lease authorized. This, however, we may put out of view.

It may be conceded that the evidence shows that the Shawnee Company was financially embarrassed, and its condition might have justified a lease of its property if that had been all it did. It, however, covenanted for its assistance in discouraging competition against its tenant, and bound itself not to “directly or indirectly engage in the compressing of cotton within fifty miles of any plant operated by the tenant.” So far it covenanted to aid in the restraint of trade. It went out of the field of competition; it covenanted not to enter into that field against, and it pledged itself to render every assistance to prevent others from entering it. And it could not misunderstand the purpose for which its lease was solicited. It was told by the president of the Gulf Compress Company. In a letter dated April 18, 1905, addressed to it by the president of that company, among other inducements, the following was expressed: “Our getting together on a lease proposed means the avoiding for each other, directly or indirectly, of the possibility, if not probability, of unnecessary competition.” And what was the condition to which the Shawnee Company contributed? It appears from the letter just mentioned that the writer was president of two companies, which operated “forty odd compresses.” Twenty-seven of them, it appears from the testimony, were operated by the Gulf Company, six only of which it owned.



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Most of the latter were acquired in the summer preceding the lease, and the president of the Gulf Company testified that "we are prepared to buy or lease, whichever proposition suits us best." To what object was the assembling in one ownership or management so many compresses, and keeping the means and declaring the purpose of acquiring more? The answer would seem to be obvious. The first effect would necessarily be the cessation of competition. If there was left a possibility of other compresses being constructed, it was made less by the power that could be opposed to them. The Gulf Company was a close corporation, which, starting in Alabama, rapidly extended from Alabama to all the cotton-growing territory. These are some of the points of the testimony which, taken in connection with other testimony, and with the terms of the lease and the restriction upon the Shawnee Company, support the conclusions of the Supreme Court of the Territory. This case presents something more than the lease of property by the Shawnee Company, induced or made necessary by financial embarrassment. It presents something more than the acquisition by the Gulf Company of another compress—of a mere addition to its business. It presents acts in aid of a scheme of monopoly. *Swift Co. v. United States*, 196 U. S. 375.

It does not appear whether the Supreme Court based its judgment upon the common law, the Sherman law act of July 2, 1890, c. 647, 26 Stat. 209, or the statutes of Oklahoma. The appellees insist that the law applicable to the case comes from all three sources. The Sherman law provides that, "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any territory of the United States or of the District of Columbia . . . is hereby declared illegal." And it has been decided that not only unreasonable but all direct restraints of trade are prohibited, the law being thereby distinguished from the common law. But it is contended that it was held in *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, and in *United States v. Joint Traffic Association*, 171 U. S. 505, that the sale of the good will of a business with an accompanying agreement not to engage in a similar business was not a restraint of trade within the meaning of the Sherman Act.

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Counsel has discussed with an affluent citation of cases the principle which regulates such contracts, and insists that the lease by the Shawnee Company conforms to such principle. The principle is well understood. The restraint upon one of the parties must not be greater than protection to the other [435] party requires, and it needs no further explanation than is given in *Gibbs v. Baltimore Gas Company*, 130 U. S. 396. The Supreme Court of the Territory recognized the principle, but said :

"Tested by the general principles applicable to contracts of this character, this agreement is far more extensive in its outlook and more onerous in its intention than is necessary to afford a fair protection to the lessee."

And in this conclusion the statute of the Territory may have had its influence. That statute makes void every contract by which any one is restrained from exercising a lawful profession, trade or business, except, however, that one who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city or part thereof. Wilson's Statutes, §§ 819, 820. It is clear that the lease of the Shawnee Company to the Gulf Company does not literally comply with this requirement. Whether it can be limited by construction, as it is contended by appellants it can be, we need not decide. As written, it was, no doubt, considered with other considerations by the court in concluding that "the real, the veritable purpose actuating the officers of the Gulf Compress Company, as disclosed by its plan of operation, and as manifested by the circumstances surrounding the conduct of its business and the results of its management by them is, beyond a reasonable question, to place within their power the control of the compress industry, by purchasing or leasing those plants which are advantageously located in each of the hauling districts or territories established by the carriers (railroads) in their cotton tariffs. Within certain boundaries the hauling must be one way, and when the Gulf Company seizes the strategic point, under its lease, competition within that district is annihilated."

*Decree affirmed.*

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[144] PENNSYLVANIA SUGAR REFINING CO. v.  
AMERICAN SUGAR REFINING CO. ET AL.\*

(Circuit Court, S. D. New York. March 20, 1908.)

[160 Fed. Rep., 144.]

**MONOPOLIES—INTERSTATE COMMERCE—SUGAR TRUST.**—The purchase of a controlling interest in the stock of a sugar refining corporation, to acquire control thereof and prevent the corporation from refining sugar in competition with the purchaser, that the latter might control the business of refining sugar for sale in the United States, does not involve a monopoly or combination in restraint of commerce within the state, in violation of section 7 of the Sherman act (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901. p. 3202]), as the manufacture of sugar does not constitute trade or commerce and only incidentally affects it.<sup>b</sup>

*Battle and Marshall* (Frank S. Black, H. Snowden Marshall, and John W. Hutchinson, jr., of counsel), for plaintiff.

*Henry B. Closson and Tompkins McIlvaine* (Henry W. Taft and John G. Johnson, of counsel), for defendants American Sugar Refining Company and Parsons.

*Francis H. Kinnicutt*, for defendants Robinson, Twigg, and Werner.

*George H. Earle, jr.*, receiver.

HOLT, District Judge.

This is a motion to dismiss the complaint on the trial on the ground that it does not state facts sufficient to constitute a cause of action. The complaint alleges, in substance, that the plaintiff is a corporation organized under the laws of Pennsylvania, with a capital stock of \$5,000,000; that the defendant the American Sugar Refining Company is a corporation organized under the laws of New Jersey, engaged in the business of importing raw sugar, and refining it, and selling the refined sugar; that the plaintiff, from 1883 till 1898, was engaged in the business of importing raw sugar, refining it, and selling it; that from 1898 to 1901 it ceased to do business, and that in 1901 it commenced the erection

\* For opinion of Circuit Court of Appeals, Second Circuit (166 Fed. 254), see *post*, page 552.

<sup>b</sup> Syllabus copyrighted, 1908, by West Publishing Co.

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of a new and enlarged refinery, which was completed in 1903; that about the time of the completion of the refinery, and before it began to do business, the defendant the American Sugar Refining Company, Gustav E. Kissell, and certain of the other defendants entered into a conspiracy in restraint of trade and commerce between the states and with foreign countries; that pursuant to that conspiracy Kissell, as agent for the American Sugar Refining Company, but without disclosing his principal, loaned to Adolph Segal \$1,250,000, and took from him as collateral security, among other property, \$2,600,000 of stock of the plaintiff, being a little more than half its entire stock, with an agreement which provided, among other things, that four of the seven directors of the plaintiff should resign and their places be filled by Kissell's principal; that such agreement was carried out, the four directors resigned, and four persons selected by the American Sugar Refining Company were elected in their place; that thereupon the four new directors, constituting a majority of such board, pursuant to such conspiracy, and by direction of the American Sugar Refining [145] Company, voted not to operate the plaintiff's plant until the further order of the board; that such plant has not been operated since; that, as a result of such conspiracy and action, the plaintiff has suffered damage in the sum of \$10,000,000—and judgment is demanded for three-fold damages, or \$30,000,000, as provided in section 7 of the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]).

The case of *United States v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, in my opinion, controls this case. That was a suit brought by the United States against the E. C. Knight Company, a Philadelphia sugar refining company, and three other Philadelphia sugar refining companies, and the defendant in this case, the American Sugar Refining Company. The charge in that case was, in substance, that the American Sugar Refining Company had purchased the entire stock of the four Philadelphia refining companies; that the result of that purchase was that the American Sugar Refining Company had obtained a substantial monopoly of the business of refining sugar in the United States. The Su-

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preme Court held that the action would not lie; that manufacture was not trade or commerce; that the action of the American Sugar Refining Company, in stopping the manufacture of sugar by the Philadelphia refineries, only incidentally affected the sale of the product; that Congress had no jurisdiction to pass laws to remedy injuries caused by such action, and that the states alone had power to pass such laws.

It is claimed by the plaintiff that this case differs from the *Knight case*. It is said that in the *Knight case* the American Sugar Refining Company purchased the entire stock of the Philadelphia refining company, and had a right to do what it chose with its own property; but that is not the ground of the decision of the Supreme Court. That decision is distinctly put upon the ground that the Sherman Act only prohibits contracts or conspiracies in restraint of trade or commerce between the states, and that it has no application to a case where all that has occurred is to stop manufacture.

It is urged that the authority of the *Knight case* has been modified by subsequent decisions, particularly the *Northern Securities case*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, and the very recent case of *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, holding that a labor union boycott may be a combination in restraint of trade, under the Sherman Anti-Trust Act. I have examined carefully those decisions, and I cannot see anything in them which would justify me in declining to follow the decision in the *Knight case*.

This suit is obviously brought upon the Sherman Anti-Trust Act, and the plaintiff's counsel admitted upon the argument that, in the present state of the pleadings, the plaintiff must recover upon that act, and could not recover upon any other theory of liability. In my opinion, no amendment can be made to the complaint which will make it good so long as it is based on the Sherman Anti-Trust Act. The citizenship of some of the defendants does not distinctly appear. If in fact this court has jurisdiction of this case on the ground of the diverse citizenship of the parties, the

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plaintiff may desire to amend the com[146]plaint and proceed upon some theory of equitable liability, in which case the plaintiff should have the usual leave to amend.

My conclusion is that the motion to dismiss the complaint should be granted, with leave to the plaintiff to amend the complaint within 30 days, upon payment of costs.

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**[184] AMERICAN BANANA CO. v. UNITED FRUIT CO.\***

(Circuit Court, S. D. New York. March 4, 1908.)

[160 Fed. Rep., 184.]

**EVIDENCE—OFFICIAL DOCUMENTS—POLITICAL QUESTIONS.**—In a suit involving complainant's right to certain lands in Costa Rico of which complainant had been deprived by that government at the alleged instigation of defendant, a certified copy of a letter written by the United States Secretary of State with reference to Costa Rico's jurisdiction over the territory, which the United States claimed belonged to Panama, was admissible as an official document constituting a statement of the position of the United States on a political, nonjudicial question.<sup>b</sup>

**INTERNATIONAL LAW—RIGHTS OF CITIZEN—GOVERNMENTAL TORTS—DAMAGES.**—Where plaintiff, a corporation of the United States, was ejected from certain land and other property over which the government of Costa Rico was exercising de facto authority by soldiers and officers of such government, whose acts were subsequently ratified by the government, plaintiff could not maintain a civil suit in the United States against defendant therefor on the ground that such governmental acts were inspired by defendant, since there was but one tort, and, as the government of Costa Rico could not be sued, no action could be maintained against defendant.

**SAME—DAMAGES—PROSPECTIVE PROFITS.**—Where, in an action for damages for ejecting plaintiff from a plantation in Costa Rico, the court could not give judgment on the validity of the original taking of plaintiff's plantation because it was a governmental act, it could not award damages for the loss of prospective profits resulting from such taking.

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\* For opinion Circuit Court of Appeals, Second Circuit (166 Fed. Rep. 261), see *post*, p. 563.

<sup>b</sup> Syllabus copyrighted, 1908, by West Publishing Co.

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**MONOPOLIES—SHERMAN LAW—DEPRIVATION OF PROFITS.**—Sherman Act, Act July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), authorizing recovery of treble damages, accruing through an unlawful combination in restraint of interstate and foreign commerce, gives no right of action to one who is not deprived of his existing profits, trade, or commerce by the formation or action of an unlawful combination or monopoly, but is merely prevented from embarking on a new enterprise by the threatening aspect of an already existing monopoly or combination.

**SAME—ACTS IN FOREIGN COUNTRIES.**—That the banana market of Central America or some portions thereof has been closed to plaintiff because defendant offered higher prices to producers than did any one else, and so obtained long-term contracts for the exclusive purchase of the producers' product, did not constitute a violation of the Sherman Act prohibiting combinations, monopolies, etc.

**SAME—ENTICEMENT OF EMPLOYÉS.**—That defendant had enticed or sought to entice away plaintiff's employés and to oppress such of defendant's own employés as presumed to buy stock in plaintiff company, its business rival, did not of itself constitute a violation of the Sherman Act, prohibiting combinations and monopolies, so as to entitle plaintiff to recover damages on that ground alone.

[185] **CARRIERS—DUTY TO FURNISH TRANSPORTATION.**—Where plaintiff sought to establish his banana business in Central America, and expended considerable money in his plant, it was engaged in foreign commerce when it began to move men, material, and supplies to and from the United States and Central American ports in furtherance of its business, and was therefore entitled to compel defendant to furnish transportation facilities on the same terms that defendant furnished such facilities to others.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, p. 2883.]

At law. This cause, brought under section 7 of the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]), having been called and a jury impaneled, defendant moved to dismiss on the pleadings.

*Wheeler, Cortis and Haight, Everett P. Wheeler, and Horace E. Deming*, for plaintiff.

*Strong and Cadwalader, Moorfield Storey, and Henry W. Taft*, for defendant.

HOUGH, District Judge.

For the purposes of this motion it will be assumed that the allegations of the complaint show the following facts to be either well pleaded or capable of judicial cognizance: In

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June, 1904, there existed in the United States a combination in restraint of trade or commerce in bananas with foreign nations, and defendant was an active party in and to such combination. At the same time defendant was either monopolizing or attempting to monopolize trade or commerce in bananas with foreign nations. By these assumptions it is not intended to intimate any opinion as to the sufficiency of all the allegations in respect of combination or monopoly. On March 30, 1899 (the alleged date of the organization of defendant), and continuously since that time, the plaintiff has been a corporation duly organized and existing under the laws of Alabama, and formed for the purpose of importing bananas into the United States from Central and South America; this is the only business of the plaintiff shown in the complaint. In June, 1904, one McConnell was in peaceable possession of a certain plantation, which was and is wholly situated within the boundaries of the Republic of Panama, as previously delimited by the arbitration of President Loubet of France. Prior to June, 1904, plaintiff had not actually engaged in the banana business, or any productive business whatever. In that month and year it acquired McConnell's right to his plantation, as also his right to construct and intention to build a railway, to bring the produce of said plantation to tide water. At that time McConnell had a grant or concession from the Republic of Panama or its predecessor sovereign, to construct said railway, which concession was assignable and actually assigned. Later in 1904 the executive department of the government of Costa Rico, acting through officials (either military or civil) and soldiers in its service, forcibly ejected plaintiff from the plantation in question, or the most important portion thereof, and seized *vi et armis* plaintiff's personal property situated there or thereabouts, including especially the material for the construction of the aforesaid [186] railroad. Such ejection of plaintiff from the real estate in question, and such seizure of personalty was perpetrated by the Corta Rican officials and soldiers aforesaid at the instigation, suggestion, and procurement of defendant, and for the purpose of preventing plaintiff from reaping the fruits of its investment in land and per-



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sonalty, and in order to prevent it from harvesting bananas from its plantation, and transporting the same to the United States in competition with defendant's own importations. Whether or not an order for the seizure aforesaid was given by the supreme governmental authority of Costa Rico before seizure made, the conduct of said soldiers and officials was approved and ratified by the government of Costa Rico, and the seizure and occupation aforesaid continued by the authority of said government down to the time of the beginning of this suit.

Before the transfer of the plantation in question to plaintiff, a certain action had been begun in a court of Costa Rico seeking to establish title to said plantation, or to the most important portion thereof, in one Astua, a citizen of Costa Rico. In that suit such proceedings were had that after said transfer of the said plantation a judgment or decree was entered declaring title to be in said Astua. Such judicial proceedings were taken at the instigation or for the benefit of this defendant with the purpose of preventing plaintiff from gathering bananas from the land in question, and exporting them to the United States in competition with defendant's imports, and, shortly after said decree passed Astua's title was transferred to a corporation allied with and controlled by defendant, and identified with the unlawful combination and monopoly aforesaid. Said proceedings of the civil or military officials of Costa Rico, and of the soldiers of that government and of the court thereof, were taken in pursuance of an asserted right of sovereignty over the plantation in question, or the principal portion thereof, and over the land on which the plaintiff's personal property aforesaid was physically situated; and such assertion of sovereignty so as aforesaid made is irreconcilable with said delimitation of boundaries between Panama and Costa Rico made by President Loubet in pursuance of an international arbitration agreement. Despite protests from the Department of State of the United States, made to the government of the Republic of Panama, Costa Rico down to the time of the beginning of this suit maintained *de facto* jurisdiction and sovereignty over the plantation in question and the land

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on which the seizure of said personal property was made. By reason of the facts so assumed for the purposes of this motion, plaintiff has never exported, gathered, cut, or harvested any bananas from the plantation in question, and has never as matter of fact at any time entered upon or engaged in trade or commerce in bananas. Both Costa Rico and Panama are sovereign independent nations, and were so at all the times in the complaint mentioned. The action of Costa Rico constituted an invasion of the territorial rights of Panama—in which invasion, however, Panama has acquiesced down to the time of the beginning of this action, and the fact of such acquiescence in the de facto sovereignty of Costa Rico over the premises in question has been recognized by the Department of State of the United States.

[187] For the purpose of preventing competition in the exportation of bananas from Costa Rico and Panama the defendant, by outbidding all other competitors, has secured long-term contracts with most, if not all, of the producers of this fruit in that region. Defendant has also caused to be established a transportation line between ports of the United States and the region where this plantation lies. Such transportation line holds itself out as a common carrier, but has refused to accept from this plaintiff lawful merchandise, and when it did not so refuse charged the plaintiff higher rates for its service as common carrier than it charged other persons and corporations similarly situated; and, finally, defendant has sought to cripple and embarrass plaintiff in its attempted or intended business operations by enticing away its employés and threatening to discharge from its own service such of its workmen as became interested financially in plaintiff's enterprise. I believe the foregoing constitutes an interpretation of the complaint as favorable to the plaintiff as could be asked upon a general demurrer.

In arriving at the foregoing statement of plaintiff's position, I have examined the certified copy produced of Secretary Root's letter dated April 16, 1906, being of the opinion that this official document constitutes a statement of the position of our own government upon a political and non-judicial question, and is therefore open to judicial cognizance within

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*Jones v. United States*, 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691, approved in *Paquete Habana*, 175 U. S. 696, 20 Sup. Ct. 290, 44 L. Ed. 320. The communications from Governor Magoon also handed up at the hearing have not been regarded, as they contain no more than information concerning the attitude of foreign governments which might or might not be accepted by our own Secretary of State.

1. The important question of law presented by the above statement is whether any damages can be recovered or any action brought in this court for the ejection of plaintiff from its plantation and the seizure of its personal property. Plaintiff asserts as the first step in establishing its demands that this court must hold that the property was in Panama; that being established, the seizure and ejection becomes as unauthorized as the acts of a sheriff outside his bailiwick when armed only with local process; and it follows that defendant as a joint tort-feasor is liable equally with the offending Costa Ricans. Let it be assumed that a tort was committed; that such tort is within the purview of section 7 of the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]), that both this defendant and the Costa Rican officials would be liable to civil suits were such tortious act committed in the United States, and that the cause of action is transitory—the inquiry still remains, who actually deprived plaintiff of its property? The answer is clear—the Republic of Costa Rico, by either originally directing or subsequently ratifying the acts of certain executive officers. The ratification is equivalent to prior authorization, on which point *Buron v. Denman*,<sup>2</sup> Ex. 167, is sufficient authority. This case was not overruled or doubted in *Baird v. Walker* [L. R. 1892] App. Cases, 491. The sole question in this later judgment was whether an officer of the crown could by [188] virtue of some treaty obligation entered into after another subject acquired property rights destroy such fellow subject's property without being answerable therefor. If the act complained of was done by Costa Rico, it is of no moment that the defendant and that republic were joint tort-feasors. There was but one tort, and if one offender can be sued, it is of the essence of the doctrine that the other must be equally

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suable. But neither Costa Rico nor its officers could be brought into our courts, for reasons fully and forcibly set forth by Wallace, J., in *Underhill v. Hernandez*, 65 Fed. 581, 13 C. C. A. 51, 38 L. R. A. 405, affirmed 168 U. S. 250, 18 Sup. Ct. 83, 42 L. Ed. 456.

No opinion is here expressed as to whether the cause of action be local or not, or whether within the reasonable interpretation of section 7 the act of seizure was "anything forbidden or declared to be unlawful" by the Sherman Act. The case last cited renders the plaintiff's claim untenable by civil action in any American court, and on grounds of the highest public policy. It is impossible to adjudicate this matter without sitting in judgment on the right of Costa Rico to do what was done. The defendant's malice, intention, or expected profit is no more important than are similar considerations in an action for false arrest—before the illegality of the arrest be demonstrated. There, as here, it is of the essence of the court's jurisdictional power to determine the validity and legality of the governmental action out of which the suit grows; and this court has no power to sit in judgment on the validity or legality of the act of any sovereign independent nation.

2. The complainant specifically demands as damages prospective profits—profits that would have flowed from the uninterrupted enjoyment of its plantation and railway, and to be obtained by harvesting (in years after 1904) its ripened crops, exporting the same to the United States, and there selling bananas without the monopolistic oppression or competition of defendant. If this court can not give judgment on the validity of the original taking of the plantation, it certainly can not award damages for the result of the taking. But apart from that difficulty, it appears that never did plaintiff enjoy or possess any trade or commerce in bananas from the plantation in question; and, remembering that this is an action under the Sherman law, I remain of the opinion that that statute gives no right of action to one who is not deprived of his existing profits, trade, or commerce by the formation or action of an unlawful combination or monopoly. but merely prevented from embarking upon a new enterprise

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by the threatening aspect of an already existing monopoly or combination. *Thompson v. Union Castle S. S. Co.* (C. C.) 149 Fed. 933. And this is in accord with the general rule of speculative damages, especially in actions of tort. *Dudley v. Briggs*, 141 Mass. 582, 6 N. E. 717, 55 Am. Rep. 494. A citizen who finds a desirable avenue of business activity closed, for reasons obnoxious to the Sherman Act may pray the department of justice to remove the unlawful obstruction; but he has suffered no actual pecuniary damage by being thwarted in what he would like to do at some future time.

[189] 3. Plaintiff further shows that the banana market of Central America, or some portion thereof, has been closed to it because defendant offered higher prices to producers than did any one else, and so obtained long contracts for the exclusive purchase of their product. I fail to see that this procedure, so beneficial to the producer is obnoxious to any section of the statute in question, even if the transactions occurred in the United States. It is still more difficult to conceive how a procedure which affects only bananas growing in Central America can be said to be affected by any law passed in pursuance of a power to regulate commerce with foreign nations and between the several states.

4. It is further shown that defendant has enticed or sought to entice away plaintiff's employés, and oppressed, or sought to oppress, such of its own employés as presumed to buy stock in plaintiff's company. These proceedings, however unfair and immoral, are not in and of themselves forbidden or declared to be unlawful by the Sherman act, and I do not think that a cause of action can be built upon these acts alone. I cannot regard it as more than a statement of evidence, which may well be used in explaining or proving the operation if not the formation of the alleged combination and monopoly.

5. Plaintiff's case finally rests upon the statement that defendant's transportation line, while acting as a common carrier, discriminated against plaintiff. The really serious question raised by this motion should in fairness have been long ago presented by demurrer, and on this motion plaintiff is entitled to great laxity in interpreting its pleadings. Regarded as an independent cause of action, I greatly doubt

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whether it is sufficiently pleaded. Yet it is true that although the plaintiff never harvested nor exported bananas, it had a business by way of preparation. It expended considerable money in its Central American plant; it was engaged in foreign commerce when it began to move men, material, and supplies to and from the United States and Central American ports; and if the plaintiff so elects I will hear testimony on this point.

This opinion is filed several days before March 9 in order that counsel may have an opportunity to consider it, and decide before the opening of court on that day whether, inasmuch as rulings in accordance herewith will exclude from the consideration of the jury the substantial case which plaintiff intended to present, it be not advisable to permit judgment to go for the defendant, that the correctness of the views here expressed may be tested in the appellate court promptly and at small expense.

NOTE.—Upon resumption of the trial on March 9, plaintiff withdrew its claim for damages arising from defendant's refusal to transport goods at fair rates, and thereupon judgment dismissing the complaint passed in favor of defendant.

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**[354] MEEKER ET AL. v. LEHIGH VALLEY RAILROAD CO.<sup>a</sup>**

(Circuit Court, S. D. New York. June 6, 1908.)

[162 Fed. Rep., 354.]

**JURY—TRIAL BY JURY—NATURE OF ACTION.**—An action by a shipper, authorized by the Sherman Anti-Trust Law (Act July 2, 1890, c. 647, § 7, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]), to recover treble damages to his business and property by reason of a conspiracy and combination by interstate carriers to charge excessive and unlawful rates for the shipment of coal from the mines to tide water, was an action at law as to which the parties were entitled to a jury trial.<sup>b</sup>

[Ed. Note.—Right to trial by jury in federal court, see notes to *O'Connell v. Reed*, 5 C. C. A. 603; *Vany v. Petree*, 26 C. C. A. 528.]

**CARRIERS—RATES—INTERSTATE COMMERCE LAW—COMPLIANCE.**—Congress by Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379

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<sup>a</sup> For opinion Circuit Court of Appeals, Second Circuit (183 Fed. Rep. 548) see *post*, page 988.

<sup>b</sup> Syllabus copyrighted, 1908, by West Publishing Co.

Statement of the Case.

(U. S. Comp. St. 1901, p. 3154), as amended by Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), having established the Interstate Commerce Commission with plenary power to determine in the first instance what rates for the transportation of interstate commerce are legal and reasonable and what are illegal and excessive, it will be presumed, in the absence of averments to the contrary, that every interstate carrier has complied with the law by establishing, printing, filing, publishing, and posting them; and hence no action can be maintained unless the complaint alleges that resort has been had to the Interstate Commerce Commission and the rate charged and paid declared excessive or unreasonable.

[355] **SAME—PLEADING.**—In an action for injuries to complainant's property and business by an alleged combination and conspiracy between interstate railroads controlling the shipment of anthracite coal, an allegation that plaintiffs' loss resulted from their being obliged to pay "unlawful rates" for the transportation of coal due to such combination and conspiracy was not effective to allege that the rates charged had been declared unlawful by the Interstate Commerce Commission.

[Ed. Note.—Jurisdiction of federal courts of suits under interstate commerce act, see note to *Bailey v. Mosher*, 11 C. C. A. 318.]

**SAME—STATUTES—SCOPE.**—The Sherman anti-trust law (Act Cong. July 2, 1890, c. 647, § 7, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]), does not give any right of action for damages sustained by the payment of excessive, unjust, or unreasonable rates to interstate carriers, such relief being provided for by the interstate commerce act.

**PLEADING—CONCLUSIONS OF LAW—DEMURRER.**—An allegation in a complaint against an interstate carrier that plaintiffs had been obliged to pay excessive and unlawful rates without any facts to support the same was a statement of a mere conclusion of law, which was not admitted by demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 527.]

At law. Demurrer to complaint in action to recover damages alleged to have been sustained by plaintiffs by reason of an alleged conspiracy and combination to raise the charges for the transportation of anthracite coal between the mines in Pennsylvania and tide water in New York and New Jersey, and to monopolize the trade and commerce in anthracite coal between the said states, and obtain control of all the coal in Pennsylvania, and to raise the market price therefor and to compel independent shippers (of whom plaintiffs are one) who should continue to compete to pay such excessive rates for the transportation of anthracite coal as to prevent such

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independent shippers from competing with such conspirators at any profit.

*Shearman and Sterling*, for plaintiffs.

*Alexander and Green* (*Frank H. Platt*, of counsel), for defendant.

**RAY**, district judge.

The bill of complaint alleges a conspiracy and combination between certain parties to do certain acts, and charges that that it was a combination and conspiracy in restraint of trade and commerce among the several states which is illegal and in violation of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and known as the "Sherman Anti-Trust Act," and that, "by reason of the said conspiracy and combination, the plaintiffs have been injured in their business and property by the defendant to their damage in the sum of \$250,000," and demand judgment for three times that sum, viz., \$750,000.

The complaint is more specific than above stated in its allegation of the damage sustained by reason of the conspiracy and combination and its execution, and says:

"(12) Pursuant to the said conspiracy and combination to obtain absolute control of the market for anthracite coal, and to that end to make the rates [356] of transportation prohibitory to independent operators and shippers, the anthracite companies had previously increased the percentages of the tide water price which they paid to the owners of coal mining properties for their coal, and, as a condition for so doing, they had also exacted from all such owners perpetual contracts for the delivery to the anthracite companies or companies controlled by them of all their coal. In this manner the anthracite companies acquired the control of nearly all the anthracite coal mined, and substantially increased the market prices therefor at the mines, but they did not obtain exclusive control.

"(13) As a result of the foregoing unlawful acts, in which the defendant participated, the independent dealers and shippers were obliged to pay for the larger sizes of coal, at the mines, a price representing 65 per cent. of the tide water market prices for the larger sizes and a price correspondingly larger for the smaller sizes, and they were required by the anthracite companies to pay on the larger sizes of coal more than 85 per cent. of the tide water price for the transportation of such coal to New York tide water for the first few years, and



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correspondingly higher rates on the smaller sizes, and they are required to pay about that percentage under the present prices of coal; so that, after allowing for wastage incidental to handling and the expenses connected with the sale and delivery of the coal to the consumers, the independent shippers have been unable to ship coal to the New York market at the said rates, except at a loss, and substantially all of them have been forced out of business at Perth Amboy except the plaintiffs, and the plaintiffs have been obliged to pay excessive and unlawful rates upon all coal shipped by them to tide water over the lines of the defendant. While the tariff rates thus prescribed also made it impossible for the coal companies controlled by the anthracite companies to make any profit, it has made no difference in the general result to the anthracite companies, as what their coal companies thus lost the anthracite companies gained, and it is a mere matter of book-keeping between the respective parent and puppet companies."

The plaintiffs do business under the firm name of "Meeker & Co.," and are engaged in the business of buying, shipping, and selling anthracite coal, and since 1898 have been shipping large quantities thereof over the lines operated by the defendant from mines in Pennsylvania to tide water at Perth Amboy, N. J., and thence to the New York market. The Lehigh Valley Coal Company, a Pennsylvania corporation, is engaged in the same business at the same places. The defendant company owns and controls its entire capital stock, and the greater part of the coal transported by it since 1899 was owned by the coal company. Eight different railroads transport coal from the anthracite region to New York Harbor. These companies, directly or indirectly, own coal lands and largely control the market for anthracite coal in the Eastern market. These, except the Pennsylvania Railroad Company, the complaint designates as the "Anthracite Companies." Sub-division 6 of the complaint alleges the conspiracy as follows:

"(6) In or about the year 1899 the anthracite companies, including the defendant, conspired and combined together to raise the charges for the transportation of anthracite coal between the mines in Pennsylvania and tide water in New Jersey and New York, and to monopolize the trade and commerce in anthracite coal between the said states and thereby to obtain control of substantially all the anthracite coal in Pennsylvania and to raise the market price therefor, especially in the New York market, and to compel such independent shippers as should continue to compete with them, to pay such excessive rates for

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the transportation of anthracite coal as to prevent such shippers from competing with them at any profit; and they have ever since maintained such conspiracy and combination."

[357] Sub-division 8 reads as follows:

"(8) Any charge made by the defendant for transporting anthracite coal from the breakers, at the said mines or collieries, to tide water, in excess of the difference between the market price at tide water and a sum representing the price prevailing at the breakers, together with the expenses of selling the coal and a reasonable allowance for interest and profits is an unreasonable and excessive and unlawful charge, because it does not permit independent shippers, including the plaintiff, to sell coal except at a loss, and has resulted in enabling the anthracite companies, owning, as they do, the capital stock of their subsidiary coal companies, to drive nearly all independent shippers out of the market; for the excessive rates paid by the subsidiary coal companies are received by the anthracite companies, respectively, and the apparent losses to the coal companies are consequently only nominal as to the anthracite companies."

Sub-division 11 reads as follows:

"(11) The said anthracite companies adopted the said recommendations made by the said committee, and in further execution of the said conspiracy and combination, and for the purpose of raising the rates for the transportation of coal and making it impossible for all independent shippers or middlemen, including the plaintiffs, to continue in business and of thus insuring their absolute control of the anthracite coal market from August, 1901, the anthracite companies, including the defendant, which prior to 1901, as hereinbefore alleged, had not charged more than the difference between the market price of the coal at the breakers and the price at tide water for transporting coal, although they had been publishing nominal tariff rates, began to exact from all independent shippers a fixed charge per ton for carrying coal to tide water in excess of such difference in prices, amounting to \$1.55 per ton for prepared coal, \$1.40 per ton for pea coal, \$1.25 per ton for buckwheat coal, and \$1.10 for coal smaller than buckwheat coal; but during the said period any charge made by the defendant for transporting anthracite coal between the said points in excess of \$1 per ton constituted an unreasonable and excessive charge, and the said charges to the plaintiffs were not only far in excess of the value of the services rendered and far more than the companies had previously received for such service, but they were in excess of the difference between the prices realized for the coal at New York tide water, after allowing for the expenses of selling and the prices paid for it at the mines, and constituted an excessive, unreasonable, and unlawful charge for the said services."

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I find in this complaint no suggestion that plaintiffs have purchased any coal at an increased price because of the conspiracy or alleged illegal combination. The damages charged are the payment of an unreasonable and excessive charge or rate by the defendant for transporting coal made so by the conspiracy and combination aforesaid; that is:

"And the plaintiffs have been obliged to pay excessive and unlawful rates upon coal shipped by them to tide water over the lines of the defendant."

This is an action at law, and the parties are entitled to a jury trial. Concede the combination and the conspiracy, the "purpose of raising the rate for the transportation of coal," and "to raise the charges for the transportation of anthracite coal," and that it has been done, and that plaintiffs have paid such increased rates, is a cause of action alleged? There is no allegation that the Interstate Commerce Commission has examined into the matter and found, declared, or adjudged the rates of transportation complained of and charged by defendant company and paid by plaintiffs to be either illegal, unreason[358]able, or excessive. It is not charged that the matter has been brought to the attention of that commission in any way. There is no averment in the complaint that the defendant and all the anthracite companies did not establish, publish, and file their rates for transporting coal as required by law. The averment is that they did publish nominal tariff rates.

The Sherman Anti-Trust Law, so called, declares (section 7) that:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

The plaintiffs must have been injured in their business or property, and the injury sustained must be charged in the complaint by proper averment. Without injury the action cannot be maintained. Unless there be an averment of in-

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jury, no cause of action is stated. Here the allegation of injury is:

"The plaintiffs have been obliged to pay excessive and unlawful rates upon all coal shipped by them to tide water over the lines of the defendant."

The compulsory payment of excessive and unlawful rates would, of course, constitute an injury to the plaintiffs in their business and property. But does this complaint sufficiently charge the payment of excessive and unlawful rates? It is conceded that these rates paid by the plaintiffs to the defendant company were paid for the transportation of interstate commerce, coal transported by the defendant from one state to another. Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), to regulate commerce, as amended by Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), establishes the Interstate Commerce Commission, authorizes that commission to inquire fully into the management of the business of all common carriers subject to the provisions of the act—all engaged in interstate and foreign commerce—obtain from them full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created. Section 13 provides for complaints by any person, firm, etc. Section 15 provides as follows:

"That the commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section thirteen of this act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this act, for the transportation of persons or property as defined in the first section of this act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the commission find the same to exist, and shall not thereafter publish, demand, or [359] collect any

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rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed. All orders of the commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the commission, unless the same shall be suspended or modified or set aside by the commission or be suspended or set aside by a court of competent jurisdiction."

Section 6 provides:

"That every common carrier subject to the provisions of this act shall file with the commission created by this act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules and regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this act."

While there are other pertinent sections and paragraphs contained in the act, I do not think it necessary to recite or refer to them.

It seems to me very plain that the Congress of the United States, having full power in the premises, has established this commission, and conferred upon it plenary power to determine, in the first instance at least, what rates for the

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transportation of interstate commerce are legal and what are illegal; that is, what rates are proper and just and reasonable and what are improper, unjust, excessive, and consequently, when so declared, illegal. It also seems clear to me that all complaining shippers are relegated to this commission, in the first instance at least, for the settlement and determination of the propriety, justice, fairness, and reasonableness of the rates established, filed, published, and posted. And I think it is presumed, in the absence of averments to the contrary, that every common carrier engaged in interstate commerce has complied with the law by establishing rates and printing, filing, publishing, and posting them. In *Texas & Pacific Railway Company v. Abilene Cotton Oil Company*, 204 U. S. 426, 439, 440, 441, 448, 27 Sup. Ct. 350, 355, 51 L. Ed. 553, the court held:

"The Interstate commerce act was intended to afford an effective and comprehensive means for redressing wrongs resulting from unjust discrimina[360]tions and undue preference, and to that end placed upon carriers the duty of publishing schedules of reasonable and uniform rates; and, consistently with the provisions of that law, a shipper cannot maintain an action at common law in a state court for excessive and unreasonable freight rates exacted on interstate shipments where the rates charged were those which had been duly fixed by the carrier according to the act, and had not been found to be unreasonable by the Interstate Commerce Commission."

At pages 439-441 of 204 U. S., pages 354 and 355 of 27 Sup. Ct. (51 L. Ed. 553), the court said:

"When the act to regulate commerce was enacted, there was contrariety of opinion whether, when a rate charged by a carrier was in and of itself reasonable, the person from whom such a charge was exacted had at common law an action against the carrier because of damage asserted to have been suffered by a discrimination against such person or preference given by the carrier to another. *Parsons v. Chicago & Northwestern Ry.*, 167 U. S. 447, 455, 17 Sup. Ct. 887, 42 L. Ed. 231; *Interstate Commerce Commission v. Baltimore & Ohio R. R.*, 145 U. S. 263, 275, 12 Sup. Ct. 844, 36 L. Ed. 699. That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the act. *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479, 494, 17 Sup. Ct. 896, 42 L. Ed. 243. And it is apparent that the means by which these great purposes were to

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be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law. *Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935; *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243. When the general scope of the act is enlightened by the considerations just stated, it becomes manifest that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and prohibitions against preferences and discrimination. This follows, because, unless the requirement of a uniform standard of rates be complied with, it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for, if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the commission, finding the established rate to be unreasonable and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. This can only be met by the suggestion that the judgment of a court, when based upon a complaint made by a shipper without previous action by the commission, would give rise to a change of the schedule rate, and thus cause the new rate resulting from the action of the court to be applicable in future as to all. This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created which would arise from a recognition of the right asserted. For if, without previous action by the commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. [361] Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the commission, would lead to favoritism, to the enforcement of one rate in

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one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed, no reason can be perceived for the enactment of the provision endowing the administrative tribunal, which the act created, with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the commission in the premises. This must be, because, if the power existed in both courts and the commission to originally hear complaints on this subject, there might be a divergence between the action of the commission and the decision of a court. In other words, the established schedule might be found reasonable by the commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible."

And finally, at page 448 of 204 U. S., page 358 of 27 Sup. Ct. (51 L. Ed. 553), the court declared:

"Concluding, as we do, that a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable, it is unnecessary for us to consider whether the court below would have had jurisdiction to afford relief if the right asserted had not been repugnant to the provisions of the act to regulate commerce. It follows, from what we have said, that the court below erred in the construction which it gave to the act to regulate commerce."

While that case arose in the state courts and came on appeal into the Supreme Court of the United States, I do not understand that it makes any difference whether the action be brought in the courts of a state or in the courts of the United States. The underlying and controlling principle is found in the last part of the opinion just quoted. It follows that this demurrer must be sustained, unless it is unnecessary to allege in the complaint that resort has been had to the Interstate Commerce Commission and the rate charged and paid declared excessive or unreasonable.



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The Sherman Act of July 2, 1890, "An act to protect trade and commerce against unlawful restraints and monopolies," gives to the injured party a right of action in any Circuit Court of the United States to any person or firm "who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful" by such act, "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce \* \* \* is hereby declared to be illegal." So "every person who shall monopolize, or attempt to monopo[362]lize any part of the trade or commerce among the several states or with foreign nations shall be deemed guilty of a misdemeanor," etc. This act does not declare or purport to declare excessive or unreasonable or unjust rates for the transportation of interstate commerce illegal. If, however, there is a combination, contract, or conspiracy to raise rates, and charge and exact excessive and unreasonable or unjust or unjustly discriminatory, etc., rates for the purpose of restraining trade or commerce (see sections 1 and 3 of the act), or such combination has that effect, then undoubtedly the combination or contract is illegal. But are the rates charged and paid illegal for the reason the combination is illegal? This act must be read and construed in connection with the act to regulate commerce as amended to date. It is the latter act that deals specifically with rates, charges for the transportation of coal, etc., among the several states, from the one state to another, and, as seen, confers on this administrative commission power to ascertain and determine what rates are unjust, unreasonable, or excessive and consequently illegal. When it has acted on complaint made and declared a rate established by a common carrier engaged in interstate commerce unjust, excessive, or unreasonable, it is determined by and in the appropriate tribunal having jurisdiction and plenary power that such rate is illegal. When this is done, there is a proper basis for the recovery of damages in the District or Circuit Court of the United States under the provisions of section 9 of the act based on the compulsory payment of excessive and unlawful rates. This is the true construction and meaning of the act as declared by the Supreme Court of the United States in *Texas & Pac. Ry.*

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v. *Abilene Cotton Oil Co.*, 204 U. S. 437, 438, 27 Sup. Ct. 356, 51 L. Ed. 553, where the court, after reciting the powers of the commission, the duties and obligations of carriers as to rates, and the control of the commission over them, says:

"Nor is there merit in the contention that section 9 of the act compels to the conclusion that it was the purpose of Congress to confer power upon courts primarily to relieve from the duty of enforcing the established rate by finding that the same as to a particular person or corporation was so unreasonable as to justify an award of damages. True it is that the general terms of the section when taken alone might sanction such a conclusion, but, when the provision of that section is read in connection with the context of the act and in the light of the considerations which we have enumerated, we think the broad construction contended for is not admissible. \* \* \* In other words, we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the commission, and therefore does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of."

Is the allegation in this complaint that "the plaintiffs have been obliged to pay excessive and unlawful rates upon all coal shipped by them to tide water over the lines of the defendant" equivalent to an averment that the rates charged and paid have been declared excessive, or unjust, or unreasonable by the Interstate Commerce Com[363]mission? A mere allegation that such rates were "excessive" is not. But the allegation is that the plaintiffs were obliged to pay "unlawful rates." In the minds of the plaintiffs and the pleader in making this allegation the "unlawful" character of the rate may be because of the combination or conspiracy, or because of its increase over former rates, etc. The averment does not necessarily charge or import that the rate established by the anthracite companies, including defendant, and paid by the plaintiffs, has been declared excessive by the Interstate Commerce Commission and consequently declared unlawful.

If it be true, and I hold it is, that a resort to the Interstate Commerce Commission is a condition precedent to the mainte-

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nance of an action in the Circuit Court of the United States to recover damages solely occasioned by the payment of excessive, unjust, or unreasonable rates for the transportation of interstate commerce, even when the exaction of such excessive rates was the result of a combination or conspiracy made unlawful by the "Sherman Anti-Trust Law," then the complaint in such an action to recover such damages solely must aver that the rates charged and exacted have been declared excessive or unreasonable or unjust by the Interstate Commerce Commission. Until that is done, the rates established, filed, published, and posted must be regarded as legal rates or lawful rates. Whether or not that has been done is an issuable fact, and the defendant has the right to be informed whether the plaintiff will attempt to prove that the rate has been condemned by the Interstate Commerce Commission. If alleged to have been so condemned, the defendant may show that the proceeding was irregular, that he did not have notice or an opportunity to be heard, etc. The plaintiff might show, under proper allegations, that the rate exacted was illegal or unlawful, because in excess of that established, filed, published, and posted, or that the rate exacted was illegal, or unlawful, because in excess of that fixed by the commission, or because no rate at all had been established, filed, and published as required by law. In either case the rate would be unlawful. Under the act for the regulation of commerce, the carrier has no right to charge or collect any rate whatever until it has been established, filed, and published. So the carrier has no right to exact a higher rate than that fixed in the filed and published schedules, and, if that has been held to be excessive, or unjust, or unreasonable, then the carrier cannot exact that. Should not the complaint state the ground on which it is claimed the rate paid was an unlawful rate? Facts showing it was an unlawful rate? I think this clearly so. *Hieronymus v. N. Y. Nat. L. Assn.*, 107 Fed. 1005, 46 C. C. A. 684, affirming 101 Fed. 12; *Williamson v. Beardsley*, 137 Fed. 467, 469, 69 C. C. A. 615; *W. H. Thomas & Son v. Barnett* (C. C.) 135 Fed. 172, 176; *St. Louis R. Co. v. Johnston*, 138 U. S. 566, 577, 10 Sup. Ct. 390, 33 L. Ed. 683; *Ritchie v. McMullen*, 159 U. S. 235, 16 Sup. Ct. 171, 40 L. Ed. 133, affirming

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(C. C.) 41 Fed. 502, 8 L. R. A. 268; *England v. Russell* (C. C.) 71 Fed. 818. I do not think the Sherman Anti-Trust Law, so called, gives any right of action for damages sustained by the payment of excessive, unjust, or unreasonable rates. I do not think that this complaint states any cause of action whatever under the provisions of that act. The cause of action for such damages as [364] are alleged here is given by the act to regulate commerce. But, treating the allegations of the complaint to the effect that this was a combination and conspiracy in restraint of trade and commerce among the several states, and that by reason thereof the plaintiffs have been injured in their business and property by the defendant in the sum of \$250,000 as surplusage, see *American Union Coal Co. v. Pennsylvania R. Co.* (C. C.) 159 Fed. 278, 279, and treating the action as really under the provisions of the act to regulate commerce—"Interstate Commerce Act"—no cause of action is stated. The allegation that "plaintiffs have been obliged to pay excessive and unlawful rates" is the statement of a mere conclusion of law with no facts to support it. It is a familiar rule that such allegations are not admitted by a demurrer.

The plaintiff says that the complaint charges, and the defendant admits by the demurrer, that by reason of the combination and conspiracy, the plaintiffs were compelled to do business "at a loss." Concede this to be so, still the action is for damages, and the only loss or injury in business or property is stated to be the payment of excessive and illegal rates for the transportation of coal from Pennsylvania into New Jersey; that, therefore, he made no profit and even lost money to the extent of the excessive charge made and exacted over a reasonable rate. Hence no damages to business or property is alleged except in the payment of "excessive rates" or "unlawful rates," and, as this is a mere conclusion not accompanied by the statement of any facts showing the rates paid to be either unlawful or excessive, the complaint does not state facts sufficient to constitute a cause of action, and the demurrer is sustained, with costs. The plaintiffs may file and serve an amended complaint within 30 days after being served with a copy of the order to be entered pursuant hereto on payment of such costs.

Syllabus.

[66] UNITED STATES v. VIRGINIA-CAROLINA  
CHEMICAL CO. ET AL.

(Circuit Court, M. D. Tennessee. July 3, 1908.)

[163 Fed. Rep., 66.]

**CRIMINAL LAW—CONSPIRACY IN RESTRAINT OF INTERSTATE TRADE—INDICTMENT—SERVICE OF PROCESS ON NONRESIDENT CORPORATION.**—Upon an indictment for conspiracy in restraint of trade under Sherman Anti-Trust Act July 2, 1890, c. 647, § 3, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3201), the court has power, by virtue of Rev. St. § 716 (U. S. Comp. St. 1901, p. 580), which authorizes such courts to issue all writs “necessary for the exercise of their respective jurisdictions,” to issue process to another state to bring before it corporation defendants who are citizens of such state and cannot be found or served in the state or district of the indictment.\*

**MONOPOLIES—INDICTMENT.**—An indictment for conspiracy in restraint of interstate trade and commerce, in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, § 3, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3201), considered, and *held* sufficient.

**GRAND JURY—APPEARANCE OF GOVERNMENT COUNSEL—SPECIAL ASSISTANT TO UNITED STATES ATTORNEY.**—Under Rev. St. §§ 363, 366 (U. S. Comp. St. 1901, pp. 208, 209), the former of which authorizes the Attorney General to employ counsel “to assist the district attorneys in the discharge of their duties,” while the latter provides for the issuance of a commission to such attorneys as are specially retained by the department of justice “to assist in the trial of any case in which the government is interested,” which must be construed together and as referring to the same class of special assistants, the Attorney General was not authorized to appoint special assistants to a district attorney having the authority or right to appear before and participate in the proceedings of a grand jury, and the presence of two such attorneys specially appointed for a particular case and their examination of witnesses on whose testimony an indictment was returned renders such indictment invalid.

*A. M. Tillman*, U. S. Atty., *Oliver E. Pagan*, Special Asst. Atty. Gen., and *Edward T. Sanford*, Asst. Atty. Gen., for the United States.

*John J. Vertrees*, *John S. Miller*, *James C. Bradford*, *Henry A. M. Smith*, *Marcellus Green*, *Geo. F. Von Kolintz* and *James M. Gifford*, for defendants.

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McCALL, District Judge.

The indictment in this case is found under the "Sherman Anti-Trust Law." The defendants are corporations and individuals, numbering about 60. The corporation defendants may be divided into three classes, viz.: (1) Foreign corporations; those chartered under the laws of other states, and which have not complied with the laws of Tennessee in relation to such corporations doing business within this state, and have no agents nor are doing business in Tennessee. (2) Foreign corporations which have complied with the laws of Tennessee, and have agents and are doing business in Tennessee. (3) Domestic corporations, those chartered under the laws of Tennessee. One class of defendants move to quash the summons and return. Another class demurs to the indictment, and also files pleas in abatement. These several defenses are [67] interposed, heard, and disposed of by agreement of counsel without regard to the order of pleading.

## ON MOTION TO QUASH SUMMONS.

Motions to quash the summonses are made by the corporation defendants which are citizens and residents of states other than Tennessee and have no agents or place of business in Tennessee. The motions are based upon the ground that defendants are foreign corporations, and had no agents or other representatives within the state of Tennessee upon whom summons could be legally served, and that summonses, issued to the states of their respective residences and citizenship, and there served, were without authority of law, and that this court has no jurisdiction over them.

This precise question was before me in the case of *United States v. Standard Oil Company*. The conclusions there reached are stated in the opinion, reported in 154 Fed. 728. The summons in that case, as in the case at bar, was issued under Rev. St. § 716 (U. S. Comp. St. 1901, p. 580), which is as follows:

"Sec. 716. The Supreme Court and the Circuit and District Courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

## Opinion of the Court.

It is respectfully but earnestly insisted for the defendants that the conclusion in that case is erroneous, and several cases are cited to sustain that contention, viz.: *McIntire v. Wood*, 7 Cranch, 506, 3 L. Ed. 420; *McClung v. Silliman*, 6 Wheat. 598, 5 L. Ed. 340; *Bath County v. Amy*, 13 Wall. 249, 20 L. Ed. 539; *Rosenbaum v. Bauer*, 120 U. S. 450, 7 Sup. Ct. 633, 30 L. Ed. 743. A careful examination of these cases discloses that the question therein decided was that the court, having no jurisdiction of the subject-matter of a controversy, could not, by virtue of section 716, Rev. St., acquire and exercise jurisdiction by the issuance of a writ of mandamus and cause the same to be served upon the party whom it was sought to force to do some act; the refusal or failure to do which being the subject of complaint. In the case of *Bath County v. Amy*, supra, the Supreme Court, after reviewing *McIntire v. Wood*, *McClung v. Silliman*, and *Kendall v. U. S.*, 12 Pet. 524, 9 L. Ed. 1181, announced the rule that the power to issue a writ of mandamus as an original and independent proceeding does not therein belong to the Circuit Court, and approving the holding in the *Silliman case*, supra, that the power to issue writs of mandamus was authorized by section 716, Revised Statutes, only in cases where the jurisdiction already existed, and not where it is to be created or acquired by means of the writ proposed to be sued out. "In other words, the writ cannot be made to confer a jurisdiction which the Circuit Court would not have without it. It is authorized only when ancillary to a jurisdiction already acquired." To the same effect is *Rosenbaum v. Bauer*, supra.

In the case of the *United States v. Plumer*, 27 Fed. Cas. No. 16,056, it was held that section 716, Revised Statutes, did not authorize the issuance of a writ of error to review the judgment of a District Court [68] in a criminal case, when such authority had not been given the Circuit Court by the judiciary act. In that case the defendant had been indicted, tried, convicted, and sentenced, and the right of appeal lost by the waiver of the motion for a new trial, and the court said:

"Completed, as the proceedings in this case were, the Circuit Court, at the date of this application, had no more power over it than if the indictment had not been found."

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Certainly, section 716, Revised Statutes, does not authorize the court to reacquire jurisdiction of a case thus finally disposed of, or to acquire original jurisdiction of the subject-matter of a controversy when there is none conferred by law. As is well said by counsel for the government:

"These cases upon which the defendants rely as a proper construction of this section are to be distinguished upon the ground that they merely deny the right to enlarge the jurisdiction of the court as to the subject-matter of litigation by the issuance of any writ under section 716."

It was held, in the *Standard Oil case*, supra, that the court had jurisdiction of the subject-matter, and, in order to enable the court to exercise that jurisdiction, it was necessary to issue the summons under section 716, Revised Statutes, as was done in that case. The jurisdiction existed; but, in order to exercise it, the defendant must be brought before the court, and it became necessary for that purpose to resort to the power granted by Congress in section 716, Revised Statutes. It was not necessary, in order to acquire jurisdiction of the case, to resort to section 716, because jurisdiction over the offense charged in the indictment was conferred by the commerce act. It was necessary to resort to section 716 in order to enable the court to exercise the jurisdiction conferred by Congress under the commerce act.

Able counsel for defendants, it seems to us, virtually concede this proposition in their brief. There it is said that:

"The statute does not authorize writs to be issued under the general power to issue 'all other writs' in order to acquire jurisdiction. The jurisdiction must already exist in order for writs to issue under this power. The 'necessity' of the statute is a judicial one. When some kind of writ that is reasonable and proper is necessary in order for the court to exercise its jurisdiction (do what in justice ought to be done), it may issue."

The necessity is as imperative to issue summons for the resident defendant corporations before the court can exercise its jurisdiction in the trial of this case as it is to issue summons for the foreign corporations. The issuance of the writ in neither case is necessary in order to acquire jurisdiction of the case, but it is necessary in both cases to enable the court to exercise the jurisdiction it has.



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In the excerpt quoted from brief of defendant's counsel, it is stated that:

"The jurisdiction must already exist in order for writs to issue under this power"—meaning section 716.

If by this is meant that jurisdiction must exist over the defendant, then the issuance of summons would be useless; but if it is meant that jurisdiction of the subject-matter must exist before summons can issue under section 716, Revised Statutes, then the answer is that that is [69] precisely the condition in this case. In other words, the issuance of the summons and its service is but one step amongst others that is necessary to enable the court to exercise its jurisdiction in the pending case, of which it has jurisdiction by statute. In my judgment, the contention of the defendants as to this branch of the case is not sustained by the authorities cited.

It is insisted that if it be conceded that the holding in the *Standard Oil Company case*, supra, is correct, it does not follow that that case should be controlling in the case at bar. It is pointed out that the indictment in that case was found under Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), which is silent as to process and procedure, and that this indictment is found under Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), which provides, among other things, that in injunction cases brought thereunder process may issue to any state, but is silent as to process to bring those indicted thereunder before the court to answer the criminal charge. Because of this omission, it is argued that the rule, "Expressio unius est exclusio alterius," applies. Removal Act March 3, 1887, c. 373, 24 Stat. 552 (U. S. Comp. St. 1901, p. 508), provides that no civil suit shall be brought "against any person by any original process or proceeding in any other district than that whereof he is an inhabitant." Act Aug. 13, 1888, c. 866, 25 Stat. 434 (U. S. Comp. St. 1901, p. 508). This was the law when the Sherman Act was passed in 1890. So, also, section 716, Revised Statutes, was then and is now in force.

With these two laws in mind, Congress passed the Sherman Anti-Trust Act, by which civil actions are authorized, and certain conduct denounced as crimes. Is it not reasonable

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that, while Congress was devising means by which defendants in such civil suits might be served with process and brought before the courts, it also considered that subject in relation to defendants in criminal cases? Is it not a reasonable conclusion that it inserted the clause as to issuance of process in civil cases to avoid the provision of the removal act of 1888, *supra*, and that it omitted to insert a clause as to defendants in criminal cases because that was then provided for under section 716, Revised Statutes, and further legislation on that subject was therefore unnecessary?

Here we find Congress engaged in perfecting and enacting a law, declaring certain acts to be crimes, and authorizing the bringing of civil suits to enjoin the commission thereof. The act upon its face discloses the fact that Congress had under consideration the subject of proper proceeding by which parties could be brought before the courts. That in civil actions thereunder, it provides that process may issue for defendants to other states than the state where the suit is pending, for the purpose, as we have seen, of avoiding the provisions of the removal act of 1888. Is it a reasonable conclusion that Congress was careful enough to make this provision as to civil suits, and so careless as to fail to insert a provision for bringing before the court corporation defendants in a criminal suit, which are citizens and residents of other states than the state wherein the indictment is pending, unless that was then provided for by a statute then in force? I can not think so. To hold otherwise, it seems, [70] would necessarily imply that Congress was extremely careless, or purposely left a loophole by which such defendants could violate the Sherman Anti-Trust Act with impunity and escape prosecution and punishment.

The motions to quash the summons and service thereof made by this class of defendants are disallowed, and this includes all non-resident corporation defendants of this class, except Swift & Co., of Illinois, and the latter's motion to quash is allowed upon the ground that it appears that it was served on a party not in any way connected with that company. The motion to quash, made by certain other defendants upon the ground that the service does not show that it

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was made upon the proper officer, is also allowed, but leave is granted to amend such service, if that is desirable.

ON THE DEMURRER.

The individual defendants and the domestic and foreign corporations, having agents and doing business in Tennessee, demur to the indictment. The indictment is a lengthy one. Many grounds of demurrer are assigned. The briefs of counsel for and against the demurrer are exhaustive and evince much labor, research, and learning. If the court should undertake to enter upon a discussion of the many questions presented, some important and others less so, the task would be all but interminable, and, the court feels, of little real use. Suffice it to say that, after as careful an examination as the court is able to give the many questions raised, it has concluded that the demurrer should be overruled. The indictment charges the defendants, in language both apt and with certainty of meaning, with acts denounced by statute as crimes. It seems to contain every element of the offense intended to be charged, and sufficiently apprises the defendants of what they must meet. This is all that is required. *Armour Packing Co. v. U. S.* (decided by Supreme Court of United States, March 16, 1908, not yet officially reported) [209 U. S., 56] 28 Sup. Ct. 428, 52 L. Ed. 681.

ON THE PLEA IN ABATEMENT.

We come now to consider the pleas in abatement to the indictment. This defense is interposed by the defendants who also demurred. The substance of the pleas is that Mr. E. T. Sanford and Mr. J. Harwood Graves, neither of whom is a citizen or resident of the Middle district of Tennessee, and neither of whom was the district attorney, nor an assistant district attorney, were present in the grand jury room, examining witnesses and participating in the proceedings, when the indictment was found, and that neither of them had any right to be there. Had this indictment been found subsequent to June 30, 1906, this plea would not now be before the court. On that day Congress passed an act, presently to

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be quoted, that provides that the Attorney General may do just what is complained of by the pleas in abatement. But this indictment was found May 26, 1906, and therefore the pleas must be considered and disposed of under the law as it was on the date that it was found. The pleas were replied to by the United States, and demurrers were filed to the replication. The sole [71] question which is presented by the pleas in abatement, the special traverse, and the demurrer thereto is this:

"Whether under the state of facts set forth in the special traverses, the presence of special assistants to the district attorney in the grand jury room and their participation in the proceedings before the grand jury, as therein set forth, constitute, as a matter of law, ground on account of which the indictment found against the defendants should be abated."

The facts are these: Edward T. Sanford and J. Harwood Graves, both being non-residents of the Middle district of Tennessee, were employed, appointed, and commissioned by the Attorney General of the United States to do certain work set forth in the commission given to each of them by the Attorney General, as follows:

"You are hereby appointed a special assistant to the United States attorney for the Middle district of Tennessee to assist in the investigation before the grand jury in that district of the so-called 'Fertilizer Trust,' and in the trial of any suits and prosecutions on behalf of the United States, against the Virginia-Carolina Chemical Company, a corporation, and other corporations and individuals arising from such investigation. Your compensation will be determined by the Attorney General upon the completion of your services, and will be payable from the appropriation for the enforcement of anti-trust laws. This appointment is subject to any change which may be made by this department. Before entering upon duty, execute and file with this department the customary oath of office."

With these commissions, or letters of appointment, said Sanford and Graves repaired to Nashville, Tenn., and prior to the commencement of the investigation before the grand jury presented their letters of appointment to the United States attorney for the Middle district of Tennessee, who thereupon presented said Sanford and Graves to the honorable United States circuit judge then and there presiding, with the information of their appointment, and stated that

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he desired that they assist him in the investigation before the grand jury, and who were, upon motion of the United States attorney, admitted to practice law in this court. Thereupon the United States attorney presented said Sanford and Graves to the grand jury with the information that they would assist in the pending investigation. Sanford and Graves were present during the investigation by the grand jury and assisted and aided therein, and participated in the examination of witnesses and heard the testimony introduced before the grand jury. Neither of said gentlemen were present in the grand jury room after the closing of the testimony, or when the jury was deliberating as to its findings and voting upon the question of returning the bill of indictment. Upon these facts, the court is asked to abate the indictment. Should it be done?

A correct answer to this question is attended with difficulties. For more than a century it has been the settled policy of the law and of the courts in its administration and enforcement to protect inviolate the secrecy of proceedings before grand juries in the United States courts, and to guard and protect them from every agency calculated to influence them in the discharge of their duties, save and except the testimony of witnesses who appear before them for examination. None but witnesses and the proper law officers of the government have any business before them, and the latter only to examine wit[72]nesses and in a proper way and at the proper time express his opinion as to the meaning of the law. There is no controversy here as to the proposition that the United States attorney and his regular assistant may attend the sessions of the grand jury for the purpose of examining witnesses, so the question narrows down to this: Were Messrs. Sanford and Graves proper officers to attend the sessions of the grand jury and examine witnesses before it?

Their letters of appointment or commissions designated them as "special assistants" to the United States attorney. It is clear that they were not United States attorneys for the middle district of Tennessee. They are not so named in their commissions. It is well-settled that they were not assistant United States attorneys. *U. S. v. Crosthwaite*, 168

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U. S. 375, 18 Sup. Ct. 107, 42 L. Ed. 507. There the court says:

"We are of the opinion that the better construction of section 365 is that one who receives a commission as special assistant to the district attorney for particular cases, or for a single term of the court, or for a limited time, is not an assistant district attorney within the meaning of that section."

There Crosthwaite was appointed special assistant to the United States attorney for the district of Idaho under section 363, the same section that authorized the appointment of Sanford and Graves as special assistants to the United States attorney for the middle district of Tennessee. He brought suit against the United States for pay for his services. The Attorney General had declined to give to him the certificate required by section 365, and it was considered by the court whether he could be paid as an assistant United States attorney, and the court, as has been seen, adjudged that he was not such an officer.

That brings us to the question: Could a special assistant to the United States attorney, at the time of the finding of this indictment, properly appear before a grand jury, and perform the duties of the United States attorney or his regular assistant in the examination of witnesses, and conduct, or assist in, the investigations of the so-called "Fertilizer Trust," as was done in this case? It is true that the commissions given to Sanford and Graves by the Attorney General set forth that they were appointed to assist in the investigation before the grand jury in this district of the so-called "Fertilizer Trust," but, under what statute, was the Attorney General authorized to issue such a commission?

The answer by the United States is that section 363, Rev. St. (U. S. Comp. St. 1901, pp. 208, 209), authorizes it, and in these words:

"The Attorney-General shall, whenever in his opinion the public interest requires it, employ and retain in the name of the United States, such attorneys and counsellors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and shall stipulate with such assistant attorneys and counsellors the amount of compensation, and shall have supervision of their conduct and proceedings."

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It is pointed out the words used here, "assist the district attorneys in the discharge of their duties," are broad and cover all duties of the district attorney, and hence must embrace this duty before the grand jury. To this contention the defendants respond that this [73] clause in section 363 is limited and defined by section 366, which is in these words:

"Every attorney and counsellor who is specially retained under the authority of the Department of Justice to assist in the trial of any case in which the government is interested, shall receive a commission from the head of such department, as a special assistant to the Attorney General or to some one of the district attorneys, as the nature of the appointment may require, and shall take the oath required by law to be taken by the district attorneys, and shall be subject to all the liabilities imposed upon them by law."

So we have in section 363 authority for the Attorney General to appoint attorneys "to assist the district attorneys in the discharge of their duties," and in section 366 we have the Attorney General authorized to issue commissions to every attorney and counsellor retained by the Department of Justice "to assist in the trial of any case in which the government is interested." It has been held in two jurisdictions that appointments made under section 363 authorized the parties so appointed to assist the district attorney in all of his duties and authorized the appearance of such special assistant to the district attorney to go before the grand jury and participate in the investigation there pending, as was done in this case; such work being a part of the duties of the district attorneys. *U. S. v. Cobban* (C. C.) 127 Fed. 713; *U. S. v. Twining* (D. C.) 132 Fed. 129. Counsel for the United States also cites *U. S. v. Crosthwaite*, 168 U. S. 375, 18 Sup. Ct. 107, 42 L. Ed. 507, to sustain this proposition. A careful examination of the latter case leads to the conclusion that this question was not raised nor decided there; but, in so far as that case is important here, it decides that a special assistant to the district attorney, under section 363, is not a regular assistant district attorney. In the *Cobban* and *Twining* cases, supra, it was held that sections 363 and 366, Rev. St., were sections taken from different acts of Congress and should be construed entirely independent of each other, and that the language, "to assist the district attorneys

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in the discharge of their duties," in section 363, was not limited or affected by the language "to assist in the trial of any case in which the government is interested," in section 366, and therefore special assistants to the district attorney were authorized to assist the district attorney in all of his duties, including his duties before the grand jury. The learned judges who decided these cases made no reference to *U. S. v. Crosthwaite*, supra, where it is stated that sections 363, 364, 365, and 366, Rev. St., are the sixteenth and seventeenth sections of act June 22, 1870, c. 150, 16 Stat. 162, 164, which were preserved and reproduced in the Revised Statutes at the above numbers. We think therefore that they should be considered as parts of the same act and construed together. *U. S. v. Rosenthal* (C. C.) 121 Fed. 868.

We will so consider them. As we have seen, section 363 authorizes the Attorney General to appoint attorneys and counsellors to assist the district attorneys in the discharge of their duties, and fixes the compensation therefor. Section 366 does not authorize the appointment of any one, but provides for the arming of the attorneys and counsellors appointed under section 363 with commissions as evidence of their appointment, prescribes the character of oath they [74] shall take, and defines their duties and liabilities, and this, too, for those attorneys and counsellors only who are specially retained by the Department of Justice in the trial of any cases in which the government is interested. They are employed and retained to assist the district attorneys in discharging their duties. These duties are stated, in section 366, to be "to assist in the trial of cases." Section 363 authorizes their appointment to assist, and section 366 especially states what they are to assist in doing, viz., "in the trial of cases." Certainly, the trial of a case does not begin before a grand jury. That is a secret investigation from which the proposed defendant is excluded and prohibited from being heard in person, by counsel, or through witnesses. An entirely *ex parte* proceeding to determine whether or not, upon the testimony of the government witnesses alone, the accused should be put upon his trial before a court and jury of his peers of his own selection, when and where he can be heard in person, by his counsel and his witnesses. *U. S. v. Rosenthal*, supra.



## Opinion of the Court.

It is to be regretted that this court cannot follow the holdings in the *Cobban* and *Twining* cases, but is constrained to hold that no authority existed at or before the finding of this indictment authorizing the Attorney General of the United States to issue a commission that would, with the sanction of law, authorize special assistants to the United States attorney to appear before and participate in the proceedings of a grand jury, as was done in this case. The Congress of the United States so understood the law to be at that time. On June 30, 1906 (more than a month after the indictment was found), it was enacted as follows:

"That the Attorney General or any officer of the Department of Justice, or any attorney or counsellor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys now are or hereafter may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought.

"Approved June 30, 1906."

Act June 30, 1906, c. 3935, 34 Stat. 16 (U. S. Comp. St. Supp. 1907, p. 44).

Here we have Congress, after this indictment was found, enacting a law authorizing the Attorney General to do the very thing that was attempted to be done in this case; that is, appoint special assistants to the district attorneys to assist them in discharging their duties in grand jury proceedings. Mr. Gillet, of the House Judiciary Committee, reported the bill from that committee, and therein said:

"As the law now stands, only the district attorney has any authority to appear before a grand jury, no matter how important the case may be, and no matter how necessary it may be to the interests of the government to have the assistance of one who is specially or particularly qualified by reason of his peculiar knowledge and skill, to properly present to the grand jury the question being considered by it."

He understood, and Congress understood, that at that time only the district attorneys had authority to appear before a grand jury, no matter how important the case may be.

[75] Why pass this act, if it was previously the law? This question was asked by Mr. Justice Strong, in *Bath County*

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v. *Amy*, 13 Wall. 249, 20 L. Ed. 539, in discussing the eleventh and fourteenth sections of the judiciary act of 1789 (Act Sept. 24, 1789, c. 20, 1 Stat. 78, 81), where it was insisted the power to issue certain writs was given by section 11, and wherein by said section 14 that power was expressly granted, and he inquires:

"Why make this grant if it had been previously made in the eleventh section?"

Had the Attorney General been authorized to appoint and commission special assistants to the district attorneys, with authority to conduct proceedings before the grand juries of the country, the act of June 30, 1906, would not have been passed. There would have been no need for it. It seems needless to add that, if the contention of counsel for the government as to the law prior to the passage of the act of June 30, 1906, is correct, that act would be but declaratory thereof, and it would in no way affect it. The court, however, does not agree with counsel for the government in the contention that the act of June 30th was the law prior to that date. It follows therefore that the court is of the opinion that the Attorney General of the United States was not authorized by law to confer upon the special assistants to the district attorney the right to conduct investigations before the grand jury, as was done in this case, and that Messrs. Sanford and Graves were improperly before the grand jury under the facts stated herein above.

Did their presence and their participation in the proceedings before the grand jury influence that body in its action?

It must be assumed that the grand jury was composed of men of average intelligence and information, who would have known that the government must have been greatly interested in the finding of this indictment and in the prosecution of the defendants before it would send two eminent lawyers, neither of whom was a resident of this district, to Nashville to especially conduct this investigation. Their presence there and participation in this investigation was bound to have impressed the jury and conveyed to them the information that the Department of Justice was exceed-

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ingly anxious that this indictment be found. Who can say how far-reaching this influence was, and what effect it had on the individual juror when he came to vote upon the finding of the indictment, assuming, as we do and must, that the conduct of these special assistants before the grand jury was as circumspect in every particular as would have been that of the district attorney had he been present and alone conducting the investigation.

As is said in *U. S. v. Edgerton* (D. C.) 80 Fed. 374:

"There must not only be no improper influence or suggestion in the grand jury room, but, as suggested in *Lewis v. Commissioners*, 74 N. C. 194, there must be no opportunity therefor. If the presence of an unauthorized person in the grand jury room may be excused, who will set bounds to the abuse to follow such a breach of the safeguards which surround the grand jury."

The same authority holds that the rule that no person other than the witness and the legally authorized attorney for the government [76] can be present during the sessions of the grand jury is inherent in the grand jury system with all the force of a statutory enactment.

In *Wilson v. State*, 70 Miss. 595, 13 South. 225, 35 Am. St. Rep. 664, the court said:

"It is a serious mistake to suppose that the right of one accused or suspected of a crime to the orderly and impartial administration of the law begins only after indictment. Immunity from prosecutions for indictable offenses, except by presentment by the grand jury, is declared and preserved by the organic law of this and all other states, and though, by reason of the secrecy of the proceedings before that body, its action is seldom brought in review, it can not be doubted that one whose acts are there the subject of investigation is as much entitled to the just, impartial, and unbiased judgment of that body as he is to that of the petit jury on his final trial."

In *Jacob Sharp's case*, 107 N. Y. 476, 14 N. E. 348, 1 Am. St. Rep. 851, the court, through Judge Peckham (now of the Supreme Court of the United States), said:

"The law must protect all who come within its sphere, whether the person who invokes its protection seems to be sorely pressed by the weight of the inculpatory evidence or not. It can not alter, for the purpose of securing the conviction of one who may be called or regarded as a great criminal, and yet be invoked for the purpose of sheltering an innocent man. In the eyes of the law, all are innocent

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until convicted in accordance with the forms of law, and by a close adherence to its rules."

To this doctrine this court subscribes. Let it be repeated:

"In the eyes of the law, all are innocent until convicted in accordance with the forms of law, and by a close adherence to its rules."

The result is that the demurrer to the replication is sustained, the plea in abatement allowed, and the indictment quashed.

Orders will be entered consistent with the views expressed in this opinion.

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[701] UNITED STATES TOBACCO CO. v. AMERICAN TOBACCO CO. ET AL.

(Circuit Court, S. D. New York. July 10, 1908.)

[163 Fed. Rep., 701.]

**MONOPOLIES—RESTRAINT IN INTERSTATE COMMERCE—STATUTES—MANUFACTURERS.**—Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), provides: That every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is illegal; that every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states or with foreign nations, shall be guilty of a misdemeanor; and that any person injured in his business or property by anything forbidden by the act may sue therefor. *Held*, that a mere agreement to monopolize the manufacture of an article of commerce is not prohibited, but that, in order to be within the act, the contract, combination, or conspiracy must be in itself in restraint of trade or commerce among the several states or with foreign nations, or, if a monopoly or attempted monopoly or combination or conspiracy to monopolize, it must be of some part of the trade or commerce among the several states or foreign nations.\*

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Monopolies, §§ 11.]

**SAME—SCOPE OF AGREEMENT.**—An agreement between defendants, manufacturers of licorice paste used in the manufacture of tobacco,

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provided that there should be no competi[702]tion in price between them, and they, from time to time, agreed and maintained arbitrary and noncompetitive prices for paste at which it was actually sold in interstate commerce. Defendants also agreed with and induced certain competitors in the business to establish and maintain arbitrary and noncompetitive prices in excess of the normal and reasonable prices that would otherwise have prevailed, and also apportioned the interstate trade and commerce in such substance and of the customers of two of the manufacturers, arbitrarily fixing the amount of business they should do, and also so managed and agreed with another that the latter should only sell 1,000,000 pounds of paste during 1904, and not more than 50,000 pounds additional during each year for five years from December 31, 1903, and, if he sold more, he should pay to another of the defendant companies certain sums approximately equal to the profits of the excess. *Held*, that such agreement constituted an unlawful interference with interstate commerce, prohibited by Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), declaring that every contract, combination, or conspiracy in restraint of trade among the several states or with foreign nations should be illegal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Monopolies, § 13.]

Demurrers to Complaint. Action for treble damages under the provisions of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

*Harlan F. Stone*, for plaintiff.

*A. H. Burroughs*, for defendants American Tobacco Company and MacAndrews & Forbes Company.

*Nicoll, Anable, Lindsay and Fuller (De Lancey Nicoll, of counsel)*, for defendants, James B. Duke and Karl Jungbluth.

RAY, District Judge.

The plaintiff is a Virginia corporation engaged in the manufacture of plug and smoking tobacco and selling said articles of merchandise in the several states of the United States and in foreign countries and engaged in commerce among the said states. The American Tobacco Company, organized in 1904, is a New Jersey corporation, and defend-

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dant James B. Duke its president. The MacAndrews & Forbes Company is a New Jersey corporation, and defendant Karl Jungbluth is its president. The J. S. Young Company is a marine corporation, organized in December, 1903, and Howard E. Young is its president.

The American Tobacco Company is the result of the merger of three companies, viz, Continental Tobacco Company, Consolidated Tobacco Company, and the American Tobacco Company about October 1, 1904. This merger took place under the laws of the state of New Jersey and pursuant to an agreement, and all the debts, duties, and liabilities of the Continental Tobacco Company attached to the defendant American Tobacco Company. Duke, from December 8, 1893, was the president of the Continental Company and has been president of the American Company since its organization, and he and these companies are and have been engaged in carrying on business in interstate commerce in tobacco and articles manufactured therefrom. From about December 8, 1903, the defendants, MacAndrews & Forbes Company and said J. S. Young Company and their presidents, respectively, were engaged in carrying on business as manufacturers and dealers in licorice paste, [703] a valuable article of merchandise, useful and necessary in the manufacture of plug and smoking tobacco. These last-named companies had factories for its manufacture in different states. These companies and their presidents by authority of the companies sold large quantities of such licorice paste to manufacturers of plug and smoking tobacco, including the plaintiff company, throughout the United States, and in pursuance of the sales shipped same from their said factories to such manufacturers in other states of the United States than those wherein the said factories were situated. The said last-named companies and their presidents controlled more than 85 per cent. of the interstate business in such licorice paste of which the MacAndrews & Forbes Company had and controlled about nine-tenths and the said J. S. Young Company about one-tenth. Prior to the consolidation, etc., these companies were competitors in business, and the plaintiff charges that they would have continued to be competitors but for the alleged unlawful combination, con-

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spiracy, contract, and agreement set out in the complaint, as follows:

"(a) Competition as to the price at which the said licorice paste was during said period sold and delivered by the said MacAndrews & Forbes Company and said J. S. Young Company, as between said corporation defendants and among them severally and their several competitors in said interstate business, trade, and commerce, was under the direction and control of the Continental Tobacco Company and of defendants, the American Tobacco Company and James B. Duke, as hereinafter stated, prevented and destroyed by the defendants herein agreeing among themselves that there should be no such competition, by the said defendants from time to time agreeing upon establishing, fixing, and maintaining arbitrary and noncompetitive prices for the said licorice paste so sold and delivered by the said defendants, MacAndrews & Forbes Company and J. S. Young Company and their several competitors in said interstate business, trade, and commerce as aforesaid, by their selling and delivering such licorice paste in such business, trade, and commerce at such arbitrary and noncompetitive prices, and by their agreeing with and inducing certain of the competitors of the said MacAndrews & Forbes Company and said J. S. Young Company, to wit, one John D. Lewis of Providence, R. I., engaged throughout said period in the manufacture and sale of and in interstate commerce in said licorice paste in the United States, and the Weaver & Sterry Company, Ltd., of New York City, N. Y., engaged throughout said period in the manufacture and sale of and in interstate commerce in said licorice paste in the United States, likewise to establish and maintain arbitrary and noncompetitive prices for said licorice paste, in said interstate business, trade, and commerce of such competitors, which said prices so agreed upon, established, fixed, and maintained by the defendants herein, and by said competitors, were greatly in excess of the prices which would at such times and during said period have prevailed for the said licorice paste in said interstate business, trade, and commerce of the said MacAndrews & Forbes Company and J. S. Young Company and their said competitors or any of them, and in excess of reasonable and normal prices for such licorice paste which would have prevailed in such business, trade, and commerce if said defendants had not engaged in said unlawful combination, conspiracy, contract, and agreement in restraint of said interstate trade and commerce, and if they had not attempted to restrain and monopolize said trade and commerce as aforesaid.

"(b) A division and apportionment of said interstate business, trade, and commerce, and of the customers of the said MacAndrews & Forbes Company and the said J. S. Young Company were made under and pursuant to the direction and control of the Continental Tobacco Company and of defendants, the American Tobacco Company and James B. Duke, as hereafter set forth, between the MacAndrews & Forbes Company and J. S. Young Company, by the terms of which

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division and apportionment as agreed upon by the Con[704]tinental Tobacco Company and the defendants herein, and each of them, the customers with whom each of the said defendant corporations, the MacAndrews & Forbes Company and the J. S. Young Company, should deal, and to whom the said corporations should sell such licorice paste so arbitrarily fixed and agreed upon and the amount of the profits which the said defendant, J. S. Young Company, should be allowed from the total business carried on by the said defendants, MacAndrews & Forbes Company and J. S. Young Company, was arbitrarily fixed, determined, and agreed upon by said Continental Tobacco Company and defendants.

"(c) The defendants herein, and each of them, under and pursuant to the control and direction of the Continental Tobacco Company and defendants, the American Tobacco Company and James B. Duke, as hereinafter set forth, so contrived and managed and agreed that the said John D. Lewis contracted and agreed with the said J. S. Young Company that he would not sell more than 1,000,000 pounds of such licorice paste during the year 1904, nor more than 50,000 pounds additional during each year for five years from December 31, 1903, so that it was agreed that the total product of sale of John D. Lewis should be not more than 1,200,000 pounds during the year 1903; it being provided by the said agreement that if he, the said John D. Lewis, should sell more than said amounts during said years respectively, he was to pay to the said J. S. Young Company an amount of money approximately equal to his profits upon the quantity sold by him in excess of such amounts respectively, and that he should establish and maintain arbitrary and noncompetitive prices as hereinafter set forth for all licorice paste sold by him, the terms and conditions of which said agreement were during said period duly complied with by the said John B. Lewis by his selling large quantities of such licorice paste at such prices.

"(d) The terms and conditions upon and under which during the said period sales of such licorice paste were made by the said MacAndrews & Forbes Company and J. S. Young Company in respect to discounts and times of payment for and of delivery of such licorice paste, and with respect to the form and character of all contracts under which the same was sold, were made noncompetitive as between said MacAndrews & Forbes Company and J. S. Young Company in said interstate business, trade, and commerce, pursuant to agreement by and between the Continental Tobacco Company and the defendants, and each of them, as hereafter set forth."

The complaint then alleges that the said conspiracy, combination, contract, and agreement was brought about by the agencies set forth in the complaint, viz.:

"In 1902 the Continental Tobacco Company acquired control of the defendant MacAndrews & Forbes Company through ownership of a



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majority of the capital stock of the MacAndrews & Forbes Company having voting power, and thereupon said Continental Tobacco Company and defendant James B. Duke, in the attempt to establish a monopoly in the business of manufacturing and selling licorice paste in the United States, and in the aid of the establishment by the said Continental Tobacco Company of a monopoly in the manufacture and sale of tobacco and tobacco products in the United States, acquired through said MacAndrews & Forbes Company control of several competitors in the business of manufacturing licorice paste, to wit, the Mellor & Rittenhouse Company of Camden, N. J., and the Stamford Manufacturing Company of Stamford, Conn., so that in the summer of 1902 the principal manufacturers of licorice paste, who remained independent of the MacAndrews & Forbes Company and the Continental Tobacco Company, and carrying on business in competition with the said MacAndrews & Forbes Company, were the J. S. Young Company, a corporation organized under the laws of the state of New Jersey (predecessor of defendant J. S. Young Company) and the said J. D. Lewis, and these the MacAndrews & Forbes Company in agreement with the Continental Tobacco Company and said James B. Duke undertook to drive out of business as independent manufacturers, and to that end sold and distributed licorice paste at greatly reduced prices and made special inducements to customers of their said competitors. That until the organization of the de[705]fendant the American Tobacco Company, as aforesaid, the business policy of the MacAndrew & Forbes Company was conducted and directed by the said Continental Tobacco Company and by the defendant James B. Duke, and the several acts of the several defendants, their agents and servants, herein set forth and constituting the combination, conspiracy, and agreement in restraint of trade and commerce herein complained of, until the organization of the said the American Tobacco Company, were dictated and directed by the said Continental Tobacco Company and the said James B. Duke, and upon the merger of the Continental Tobacco Company into the defendant the American Tobacco Company, as aforesaid, it then acquired control of the MacAndrews & Forbes Company through ownership of a majority of the shares of the capital stock of said MacAndrews & Forbes Company having voting power, and thereafter the business policy of the said MacAndrews & Forbes Company was directed and controlled by the defendant the American Tobacco Company, through and by the defendant James B. Duke, as its president, and the several acts occurring thereafter of the several defendants, their agents and servants, herein set forth and constituting the combination, conspiracy, and agreement in restraint of trade herein complained of, were dictated and directed by the said the American Tobacco Company and by defendant the said James B. Duke, as its president.

"On or about October, 1903, under and pursuant to the direction and control, as aforesaid, of the Continental Tobacco Company and

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of said James B. Duke, an agreement was reached between the defendant MacAndrews & Forbes Company and the said J. S. Young Company of New Jersey, by which it was agreed that a new corporation was to be organized with the name 'J. S. Young Company' and \$800,000 capital, to which the business of the old Young Company was to be transferred, and a large majority of the common stock, which alone had voting power, was to be issued to the MacAndrews & Forbes Company for no other consideration than its guaranteeing the annual sale of 5,000,000 pounds of licorice paste by the new Young Company. and guaranteeing payment of dividends of 6 per cent. on \$500,000 of its preferred stock. Pursuant to this agreement, J. S. Young Company was organized on or about December, 1903, and on or about December 8, 1903, the defendant, MacAndrews & Forbes Company, then being controlled and directed by the Continental Tobacco Company and defendant James B. Duke, as aforesaid, in the manner herein set forth, and pursuant to such control and direction, and pursuant to said agreement between MacAndrews & Forbes Company and the J. S. Young Company of New Jersey, entered into and executed a written agreement with said J. S. Young Company, which written contract or agreement provided, among other things, for the acquisition by the said MacAndrews & Forbes Company of control of the defendant J. S. Young Company through the acquisition and ownership of a majority of the shares of stock of the defendant J. S. Young Company having voting power. That a true copy of said contract marked 'A' is annexed hereto and made part hereof. That pursuant to said contract defendant MacAndrews & Forbes Company acquired 2,000 shares of the capital stock of said J. S. Young Company, having a par value of \$100 each, being a majority of the shares of capital stock of the J. S. Young Company having voting power, and from and after said date, and throughout said period, said contract was fully performed by the parties thereto, and the said defendant J. S. Young Company, although maintaining a separate corporate existence, came under the complete control of said MacAndrews & Forbes Company, whose officers issued orders and directions directly to the agents and servants of the said J. S. Young Company, which control continued through the said period hereinbefore mentioned.

"After the organization of the defendant J. S. Young Company, it announced and advertised itself to be independent of the said Continental Tobacco Company and said MacAndrews & Forbes Company, and of all trusts and combinations, and sought to and did mislead and defraud the public by falsely advertising, as aforesaid, that it was independent of and engaged in fair competition with other manufacturers of licorice paste, and after December 8, 1903, the said defendants, acting in concert and by agreement, and combining together as aforesaid, under the ultimate direction of the Continental Tobacco Company and James B. Duke, as aforesaid, from time to time raised

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the price [706] of said licorice paste to purchasers and consumers thereof in said trade and commerce. Thereafter, on or about December 31, 1903, the defendant J. S. Young Company, pursuant to the directions and control of the said MacAndrews & Forbes Company, and pursuant to the ultimate direction and control of the Continental Tobacco Company and defendant James B. Duke, as aforesaid, entered into a written contract with the said J. D. Lewis of Providence, R. I., wherein and whereby it was agreed that the amount of output of licorice by the said Lewis for the period of five years from the date thereof should be limited, and wherein and whereby the said J. S. Young Company was given power to regulate the price at which the said Lewis should sell the same said licorice paste and an interest in the profits made on his said business by Lewis, and wherein and whereby it was provided that the price for licorice paste, sold by the said Lewis should be always during said five years one-quarter of a cent per pound less than that sold by the said J. S. Young Company. That a true copy of said agreement, marked 'B' is annexed hereto and made part hereof. Thereafter, the said defendants, acting in concert with the said Lewis and by agreement and combining together, as aforesaid, and under the ultimate direction at first of said Continental Tobacco Company and thereafter of the American Tobacco Company and of said James B. Duke, as aforesaid, from time to time with said Lewis raised the price of said licorice paste to purchasers and consumers thereof in said trade and commerce; the said prices for licorice paste being always as provided in and by the said agreements and contracts so fixed and arranged by said defendants. That the defendant MacAndrews & Forbes Company charged one-half a cent per pound for said licorice paste more than the said J. S. Young Company, and that the said J. S. Young Company charged always for said licorice paste one-quarter of a cent a pound more than the said J. D. Lewis. Thereafter, by agreement and concerted action also among the several defendants and the said J. D. Lewis, the said MacAndrews & Forbes Company and the said J. S. Young Company with said J. D. Lewis, and each of them, declined to sell to prospective purchasers of said licorice paste, including plaintiff, the full amount of the orders of such purchasers, but by such agreement and concert arbitrarily limited the amount which should be sold to any such customer or customers. Thereafter on or about June, 1904, the said J. S. Young Company, still under the direction of defendant MacAndrews & Forbes Company, and under the ultimate direction of the Continental Tobacco Company and said James B. Duke, as aforesaid, entered into an agreement with the said Weaver & Sterry Company, Ltd., whereby it was agreed that the uniform minimum price of said Weaver & Sterry Company, Ltd., for said licorice paste should be fixed at 9½ cents per pound after July 1st of that year, and that no contracts for furnishing an indefinite quantity of said licorice paste to customers at that or any price should be

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made, and that such price agreement should continue until the close of the year 1906.

"The Continental Tobacco Company and defendants other than the American Tobacco Company, having thus acquired control of interstate trade and commerce in the United States in licorice paste, thereafter from time to time during said period and together with defendant the American Tobacco Company, after its organization, by concerted action between them and said J. D. Lewis and Weaver & Sterry Company, Ltd., raised the price of such paste, and in pursuance of said combination and conspiracy and agreement in restraint of trade, it was on or about July, 1904, and thereafter arranged and agreed by the Continental Tobacco Company and by said defendants and by the said J. D. Lewis and said Weaver & Sterry Company, Ltd., and each of them, and said arrangement and agreement thereafter carried out by concerted action by them, that the trade in said licorice paste should be apportioned as follows: As far as pre-existing contracts would permit, said MacAndrews & Forbes Company was thereafter to sell said licorice paste to no one but to the said American Tobacco Company and said Continental Tobacco Company, and manufacturers controlled by or affiliated with them, and in the event that any other manufacturer attempted to buy from the said MacAndrews & Forbes Company, said MacAndrews & Forbes Company was to demand of such prospective customers a price for such licorice paste uniformly higher than that asked by any of the said other parties to said combination [707] and conspiracy, and thus induce such independent manufacturers to purchase their supplies or licorice paste of the said J. S. Young Company, J. D. Lewis, and Weaver & Sterry, Ltd., or some of them under a uniform form of contract as hereafter stated. It was further agreed and provided that defendant J. S. Young Company and said J. D. Lewis should offer to manufacturers of tobacco known as 'independent tobacco manufacturers,' i. e., manufacturers other than those controlled by or affiliated with the American Tobacco Company and the said Continental Tobacco Company as aforesaid, a uniform form of contract, being for two years, whereby the supply demandable by the manufacturer was fixed at a minimum, which he was obligated by said contract to take and a greater maximum beyond which he was not entitled to purchase licorice paste at 9¼ cents per pound from the said J. S. Young Company, and 9½ cents per pound from the said Lewis, and the price for said paste to be subject to increase for the second year. That a true copy of such proposed contract, omitting dates and names, amounts and prices, marked 'C,' is annexed hereto and made part hereof. That the persons with whom said Lewis could make this agreement or contract were fixed and determined upon by the defendant MacAndrews & Forbes Company, which instructed both the said Lewis and the defendant J. S. Young Company to sell to no customer whose requirements exceeded 20 cases of said licorice paste per annum, who failed to sign said form of contract, and it was further agreed among the said defendants, the

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said Continental Tobacco Company and the said Lewis and said J. S. Young Company, that very small consumers, i. e., those using less than 20 cases per year, might still obtain licorice paste at 10¼ cents per pound from Lewis or 10½ cents per pound from the said J. S. Young Company. That said last-mentioned agreement between defendants and John D. Lewis was carried into effect by defendants and John D. Lewis by apportioning said contracts for licorice paste as aforesaid, and by said MacAndrews & Forbes Company placing prohibitive prices upon said licorice paste, as aforesaid, to all customers who were so-called 'independent' tobacco manufacturers, and by said J. S. Young Company and said J. D. Lewis offering to customers who were independent manufacturers, including the plaintiff, said uniform form of contract, and requiring them to execute said contract as a condition of filling their orders for licorice paste."

As I look at this complaint, the most material allegation is the one wherein it is charged that John D. Lewis contracted and agreed with the J. S. Young Company that he would not sell more than 1,000,000 pounds of such licorice paste during the year 1904, nor more than 50,000 pounds additional during each year for five years from December 31, 1903, so that the total production of Lewis should not be more than 1,200,000 pounds during the year 1908. It would seem from this allegation of the complaint that it was a part of the agreement and combination that one person engaged in the manufacture and sale of licorice paste to various customers throughout the United States was not to sell more than the amount specified. If he lived up to his agreement and did not sell but a limited amount, that limited amount only would be shipped by him, and the result would be that a less amount of licorice paste sold by Lewis would pass from state to state. It does not follow, however, that there would be any restraint upon interstate commerce. There was no agreement or combination that a sufficient amount of licorice paste should not be manufactured and sold to fully supply the market and all demands therefor throughout the United States. The allegations of the complaint are, however, that, if Lewis did sell more than the amounts specified, then he was to pay to the J. S. Young Company an amount of money approximately equal to his profits upon the quantity sold by him in excess of such specified amounts.

[708] I do not find in this complaint any direct allegation of a conspiracy, combination, contract, or agreement to re-

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strain or interfere with interstate trade and commerce. It seems to have been a combination and conspiracy to monopolize the production of licorice paste and to establish and maintain arbitrary and non-competitive prices for such article. The act of July 2, 1890, "An act to protect trade and commerce against unlawful restraints and monopolies" (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), provides that:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

Also:

"Every person who shall monopolize or attempt to monopolize, or combine, or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor," etc.

And:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor," etc.

It is self-evident that the contract, combination, or conspiracy must be in its operation in restraint of trade or commerce among the several states or with foreign nations, or, if a monopoly or attempted monopoly or combination or conspiracy to monopolize, that it must be of some part of the trade or commerce among the several states or with foreign nations.

In *United States v. E. C. Knight Company*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, the American Sugar Refining Company by means of a combination had obtained a practical monopoly of the business of manufacturing sugar, but the combination only related to the manufacture of sugar, and not to its sale, transportation, and delivery among the several States. Manufacture is no part of interstate or international commerce, even though the article manufactured is designed for ultimate sale and transportation to another state or transportation to and sale in another state. But the court said:

"Contracts to buy, sell, or exchange goods to be transported among the several states, the transportation and its instrumentalities, and

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articles bought, sold, or exchanged for the purpose of such transit among the states, or put in the way of transit, may be regulated; but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce."

Assume that the companies and individuals mentioned in the complaint here were engaged in the manufacture and production of licorice paste, that they were each engaged in selling and transporting their product to other states and to each of the other states, that one or more of them desired to monopolize the manufacture of such paste and to increase the price thereof and the cost thereof to the consumer, and that [709] an agreement was made by all whereby this privilege and power was conferred upon one or two of the companies. What has all this to do with interstate commerce? How does such an agreement or combination or monopoly have to do with interstate commerce or affect it? In the *Knight case*, supra, the court said:

"Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense, and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly."

In *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, at pages 240, 241, 242, 20 Sup. Ct. 96, at page 107, 44 L. Ed. 136, the court, in commenting on the *Knight case* and in deciding the case then before it, said:

"The direct purpose of the combination in the *Knight case* was the control of the manufacture of sugar. There was no combination or agreement, in terms, regarding the future disposition of the manufactured article—nothing looking to a transaction in the nature of interstate commerce. The probable intention on the part of the manufacturer of the sugar to thereafter dispose of it by sending it to some market in another state was held to be immaterial and not to alter the character of the combination. The various cases which had been decided in this court relating to the subject of interstate commerce, and to the difference between that and the manufacture of commodities, and also the police power of the states as affected by the commerce clause of the Constitution, were adverted to, and the

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case was decided upon the principle that a combination simply to control manufacture was not a violation of the act of Congress, because such a contract or combination did not directly control or affect interstate commerce, but that contracts for the sale and transportation to other states of specific articles were proper subjects for regulation because they did form part of such commerce. We think the case now before us involves contracts of the nature last above mentioned, not incidentally or collaterally, but as a direct and immediate result of the combination engaged in by the defendants. While no particular contract regarding the furnishing of pipe and the price for which it should be furnished was in the contemplation of the parties to the combination at the time of its formation, yet it was their intention, as it was the purpose of the combination, to directly and by means of such combination increase the price for which all contracts for the delivery of pipe within the territory above described should be made, and the latter result was to be achieved by abolishing all competition between the parties to the combination. The direct and immediate result of the combination was therefore necessarily a restraint upon interstate commerce in respect of articles manufactured by any of the parties to it to be transported beyond the state in which they were made. The defendants by reason of this combination and agreement could only send their goods out of the state in which they were manufactured for sale and delivery in another state, upon the terms and pursuant to the provisions of such combination. As pertinently asked by the court below, was not this a direct restraint upon interstate commerce in those goods?

"If dealers in any commodity agreed among themselves that any particular territory bounded by state lines should be furnished with such commodity by certain members only of the combination, and the others would abstain from business in that territory, would not such agreement be regarded as one in restraint of interstate trade? If the price of the commodity were thereby enhanced (as it naturally would be), the character of the agreement would be still more clearly one in restraint of trade. Is there any substantial difference where, by agreement among themselves, the parties choose one of their number to make a bid for the supply of the pipe for delivery in another state, and agree that all the other bids shall be for a larger sum, thus practically restricting all but the member agreed upon from any attempt to supply the demand for the pipe or to enter into competition for the business? Does not an agreement or combination of that kind restrain interstate trade, and when Congress has acted by the passage of a statute like the one under consideration, does not such a contract clearly violate that statute? As has frequently been said, interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase.



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sale, and exchange of commodities. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196-20, 5 Sup. Ct. 826, 29 L. Ed. 158; *Kidd v. Pearson*, 128 U. S. 1, 20, 9 Sup. Ct. 6, 32 L. Ed. 346. If therefore an agreement or combination directly restrains not alone the manufacture, but the purchase, sale, or exchange of the manufactured commodity among the several states, it is brought within the provisions of the statute. The power to regulate such commerce—that is, the power to prescribe the rules by which it shall be governed—is vested in Congress, and, when Congress has enacted a statute such as the one in question, any agreement or combination which directly operates, not alone upon the manufacture, but upon the sale, transportation, and delivery of an article of interstate commerce, by preventing or restricting its sale, etc., thereby regulates interstate commerce to that extent and to the same extent trenches upon the power of the National Legislature and violates the statute. We think it plain that this contract or combination effects that result."

I think this brings us to a consideration of the question whether the contracts, combination, and agreement set forth in this complaint relate to or have anything to do with the sale and transportation to other states of licorice paste, or the transportation to and sale in other states of such article. If so, did it act or operate, when carried out in whole or in part, to restrain or interfere with interstate commerce? If so, the agreement or combination was illegal within the terms of the act referred to.

An analysis of the agreement or combination shows as follows: (1) It was agreed by the defendants that there should be no competition in price for said licorice paste. (2) The defendants agreed from time to time upon and maintained arbitrary and non-competitive prices for such paste. (3) They actually sold at such prices. (4) They agreed with and induced certain competitors in the business of making and selling such paste to establish and maintain arbitrary and noncompetitive prices. (5) Such prices were in excess of the normal prices that would have prevailed and in excess of reasonable and normal prices. (6) A division and apportionment of such interstate trade and commerce in licorice paste and of the customers of said MacAndrews & Forbes Company and said J. S. Young Company were made by them, by the terms of which division and apportionment the customers with whom each of said defendant corporations

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the MacAndrews & Forbes Company and the J. S. Young Company should deal and to whom the said two corporations should sell such licorice paste at such prices, and the amount of profits which the Young Company should be allowed from the total business carried on by the MacAndrews & Young companies was arbitrarily fixed by the Continental Company and the defendants. (7) The defendants so managed and agreed that John D. Lewis contracted with the Young Company that he would only sell 1,000,000 pounds during the year 1904, nor more than 50,000 pounds additional during each year for five years from December 31, 1903, and so that his total sales should not be more than 1,200,000 pounds [711] during the year 1908, but that if he sold more than the amounts specified then he was to pay the Young Company certain sums of money. There is no allegation of any agreement to cut down the production of licorice paste or the aggregate sales by all together or to interfere with or restrict shipments to any point. Sales by certain parties were confined to certain customers in certain localities of course.

It is not difficult for me to see how all this, if done, would interfere with or restrain, and to an extent at least regulate, interstate commerce. All customers were to be supplied, all orders filled, all shipments called for made, we will assume; but this contract or these contracts, these agreements, this combination was to increase prices beyond what was reasonable, and it related, not to this merely, but to sales and necessarily to the transportation of the merchandise. It determined, to an extent at least, the points from which shipments were to be made and the amounts of such shipments as were actually made, and so affected rates, etc.

Says Mr. Justice Peckham, in the *Addyston Pipe case*, supra, referring to the *Knight case*:

"And the case was decided upon the principle that a combination simply to control manufacture was not a violation of the act of Congress, because such a contract or combination did not directly control or affect interstate commerce, but that contracts for the sale and transportation to other states of specific articles were proper subjects for regulation because they did form part of such commerce."

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He then stated that the case then before the court involved contracts of the nature last above mentioned, and said:

"While no particular contract regarding the furnishing of pipe and the price for which it should be furnished was in the contemplation of the parties to the combination at the time of its formation, yet it was their intention, as it was the purpose of the combination, to directly and by means of such combination increase the price for which all contracts for the delivery of pipe within the territory above described should be made, and the latter result was to be achieved by abolishing all competition between the parties to the combination. The direct and immediate result of the combination was therefore necessarily a restraint upon interstate commerce in respect of articles manufactured by any of the parties to it to be transported beyond the state in which they were made. The defendants by reason of this combination and agreement could only send their goods out of the state in which they were manufactured for sale and delivery in another state, upon the terms and pursuant to the provisions of such combination. As pertinently asked by the court below, was not this a direct restraint upon interstate commerce in those goods?"

It seems to me that the allegations of this complaint, discarding conclusions, state facts which, if true, show an illegal combination in restraint of interstate commerce within the *Addyston Pipe case*, supra. That case is not on all fours with this, but the principles enunciated seem to cover this case. It is clear that the combination alleged went beyond mere manufacture and the fixing of arbitrary and exorbitant prices for the article so manufactured. As alleged, it related to sales of the product in different states and necessarily to the delivery thereof.

As to damages, it seems to me very clear that the allegations are ample. Assuming that the combination was illegal and in violation of the act referred to, the complaint says the defendants fixed arbitrary [712] and excessive and unreasonable prices, and that they raised the price from 7 to 10½ cents per pound, and that by reason of such combination, etc., the plaintiff was compelled to pay, and did pay, the excessive and unreasonable price for licorice paste. If the defendants by an illegal agreement and combination, in violation of the act, arbitrarily increased the price of this commodity to the consumers, the plaintiff amongst others, and made the price excessive and unreasonable and much greater than it would have been but for such combination,

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and the plaintiff was compelled to pay that unreasonable and excessive price and more than its actual value because of the illegal agreement or combination, and did pay it, he was clearly injured in his property thereby. *Chattanooga Foundry v. City of Atlanta*, 203 U. S. 390, 396, 27 Sup. Ct. 65, 66, 51 L. Ed. 241, where it is said:

"The facts gave rise to a cause of action under the act of Congress. The city was a person within the meaning of section 7 by the express provision of section 8. It was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced is injured in his property. The transaction which did the wrong was a transaction between parties in different states, if that be material. The fact that the defendants and others had combined with the seller led to the excessive charge which the seller made in the interest of the trust by arrangement with its members, and which the buyer was induced to pay by the semblance of competition, also arranged by the members of the trust."

I am of the opinion that the complaint states a cause of action, and that the demurrers should be overruled, with costs. On payment of costs within 30 days, the defendants may answer.

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WEISERT BROS. TOBACCO CO. v. AMERICAN TOBACCO CO. ET AL.

LARUS & BRO. CO. v. SAME.

(Circuit Court, S. D. New York. July 10, 1908.)

[163 Fed. Rep., 712.]

*Harlan F. Stone*, for plaintiff.

*A. H. Burroughs*, for defendants American Tobacco Company and MacAndrews & Forbes Company.

*Nicoll, Anable, Lindsay and Fuller (De Lancey Nicoll, of counsel)*, for defendants James B. Duke and Karl Jungbluth.

RAY, District Judge.

In *United States Tobacco Company v. American Tobacco Company et al.*, 163 Fed. 701, I have stated some of the reasons which lead me to the conclusion that a cause of action is stated in that case. A reading of the complaints in the above cases leads me to the same conclusion therein.

Demurrers overruled, with costs. On payment thereof in 30 days, defendants may answer.

Syllabus.

[700] UNITED STATES *v.* AMERICAN TOBACCO  
CO. ET AL.<sup>a</sup>

(Circuit Court, S. D. New York. November 7, 1908.)

[164 Fed. Rep., 700.]

**MONOPOLIES (§ 12)**—"COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE."—Every combination which restrains free competition in interstate trade is a combination in restraint of interstate commerce, in violation of Sherman Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).<sup>b</sup>

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

For other definitions, see Words and Phrases, vol. 2, pp. 1275-1276; vol. 8, p. 7606.]

**MONOPOLIES (§ 20)**—"COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE"—**CONSOLIDATION OF COMPETING CORPORATIONS.**—The consolidation into one corporation of a large number of corporations engaged in the different branches of the tobacco industry, many of which were previously active competitors in interstate and foreign commerce, with the result of eliminating such competition and of giving the consolidated company control of at least 75 per cent of the entire manufactured tobacco business of the United States, including the interstate trade therein, constitutes a "combination in restraint of interstate commerce," in violation of Sherman Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 20.]

**COMMERCE (§ 40)**—"INTERSTATE COMMERCE"—**WHAT CONSTITUTES.**—A corporation engaged in the manufacture and sale of tobacco in its various forms, which purchases its raw materials and supplies in different states and in foreign countries, and ships them by means of common carriers into other states for manufacture, and its products from one state into another between its different factories and agencies, and sells the same by means of agencies and salesmen throughout the United States and in the markets of the world, is engaged in "interstate commerce," and it is immaterial that it distributes its products by means of common carriers or that the title technically passes on delivery to such carriers.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 29, 30; Dec. Dig. § 40.]

For other definitions, see Words and Phrases, vol. 4, pp. 3724-3731.]

<sup>a</sup> For important portions of decree, see *post*, p. 463; for opinion of Supreme Court (221 U. S. 106), see vol. 4, p. 168; for important provisions of final decree ordering dissolution of combination, see vol. 4, p. 246.

<sup>b</sup> Syllabus copyrighted, 1908, by West Publishing Co.

## Opinion of the Court.

**MONOPOLIES (§ 17)—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE—SUBSIDIARY CORPORATION—"UNLAWFUL MONOPOLY."**—A corporation engaged in selling tobacco products at retail is not rendered unlawful by the fact that a majority of its stock is owned by another corporation, which is itself an unlawful combination in restraint of interstate commerce, and which sells to the retalling corporation the [701] larger part of its goods, where the latter conducts its business independently in a lawful manner, and sells also goods of other manufacturers. Nor does it constitute an "unlawful monopoly," in violation of Sherman Act July 2, 1890, c. 647, § 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), because it operates in the several states 400 retail stores out of 600,000 places where tobacco is sold.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 17.]

WARD, Circuit Judge, dissenting.

In equity.

*J. C. McReynolds* and *Edwin P. Grosvenor*, Sp. Asst. Atty. Gen., for complainant.

*William J. Wallace*, *W. W. Fuller*, *Delancey Nicoll*, and *Junius Parker*, for American Tobacco Co. and constituent companies.

*William B. Hornblower*, *W. W. Miller*, *Morgan M. Mann*, and *John Pickrell*, for Imperial Tobacco Co.

*Charles R. Carruth*, for R. P. Richardson, Jr., & Co., Inc.

*Stroock and Stroock* (*S. M. Stroock*, of counsel), for United Cigar Stores Co.

Before LACOMBE, COXE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge.

Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), in its first section, declares to be illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations." That declaration, ambiguous when enacted, is, as the writer conceives, no longer open to construction in the inferior federal courts. Disregarding various dicta and following the several propositions which have been approved by successive majorities of the

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Supreme Court, this language is to be construed as prohibiting any contract or combination whose direct effect is to prevent the free play of competition, and thus tend to deprive the country of the services of any number of independent dealers however small. As thus construed the statute is revolutionary. By this it is not intended to imply that the construction is incorrect. When we remember the circumstances under which the act was passed, the popular prejudice against large aggregations of capital, and the loud outcry against combinations which might in one way or another interfere to suppress or check the full, free, and wholly unrestrained competition which was assumed, rightly or wrongly, to be the very "life of trade," it would not be surprising to find that Congress had responded to what seemed to be the wishes of a large part, if not the majority, of the community, and that it intended to secure such competition against the operation of natural laws. The act may be termed revolutionary, because, before its passage, the courts had recognized a "restraint of trade" which was held not to be unfair, but permissible, although it operated in some measure to restrict competition. By insensible degrees, under the operation of many causes, business, manufacturing and trading alike, has more and more developed a tendency toward larger and larger aggregations of capital and more extensive combinations of individual enterprise. It is contended that, under existing conditions, in that way only can production be increased and cheapened, new markets opened and developed, stability in reasonable prices secured, and industrial progress assured. But every aggregation of individuals or corporations, formerly independent, immediately upon its formation terminates an existing competition, whether or not some other competition may subsequently arise. The act as above construed prohibits every contract or combination in restraint of competition. Size is not made the test: Two individuals who have been driving rival express wagons between villages in two contiguous states, who enter into a combination to join forces and operate a single line, restrain an existing competition; and it would seem to make little difference whether they make such combination more effective by forming a partnership or not.

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Accepting this construction of the statute, as it would seem this court must accept it, there can be little doubt that it has been violated in this case. The formation of the original American Tobacco Company, which antedated the Sherman Act, may be disregarded. But the present American Tobacco Company was formed by subsequent merger of the original company with the Continental Tobacco Company and the Consolidated Tobacco Company, and when that merger became complete two of its existing competitors in the tobacco business were eliminated.

What benefits may have come from this combination, or from the others complained of, it is not material to inquire, nor need subsequent business methods be considered, nor the effects on production or prices. The record in this case does not indicate that there has been any increase in the price of tobacco products to the consumer. There is an absence of persuasive evidence that by unfair competition or improper practices independent dealers have been dragooned into giving up their individual enterprises and selling out to the principal defendant. In this connection interesting testimony is given by one of the government's witnesses. The deponent was for many years an independent dealer and secretary of the Independent Tobacco Manufacturers' Association. He testified:

"My business was conducted by me alone. I had no partner, no corporation. It had got to be a large business, and if anything happened to me there was no one there to continue it. The value of the business was in a brand, and I became fearsome what would happen to it if I would be disabled in any way. It would not be much value to my estate unless some one had a knowledge of the business and knew how to manage it, and then I believed there was a maximum business beyond which you cannot conduct it profitably personally. It will get so big that it requires an organization. And then, too, I was only identified as a scrap tobacco manufacturer; and, going by precedent, the consuming public of tobacco changes every 10, 12, or 15 years, and I have figured that might happen again, and it wouldn't use scrap tobacco, and might use something else, and then I would not have much business, I thought; whereas the American Tobacco Company had been in conference with me, I knew the officers, and I made up my mind, when a proper proposition was made to me, such as was satisfactory to me, I would be very anxious to affiliate myself with a good, big tobacco organization, large enough and strong



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enough to take care of all conditions that might come up. I was not induced to sell out by a decrease of profits or by any unfair competition. I never had any fear they could drive me out of business."

[703] During the existence of the American Tobacco Company new enterprises have been started, some with small capital, in competition with it, and have thriven. The price of leaf tobacco—the raw material—except for one brief period of abnormal conditions, has steadily increased, until it has nearly doubled, while at the same time 150,000 additional acres have been devoted to tobacco crops and the consumption of the leaf has greatly increased. Through the enterprise of defendant and at large expense new markets for American tobacco have been opened or developed in India, China, and elsewhere. But all this is immaterial. Each one of these purchases of existing concerns, complained of in the petition, was a contract and combination in restraint of a competition existing when it was entered into, and that is sufficient to bring it within the ban of this drastic statute.

A large part of the record is taken up with testimony as to concealment of the relations existing between some of the defendants. It is difficult to see what bearing this has on the questions in controversy. If an agreement by a corporation to acquire a majority of the stock in a competing corporation is obnoxious to the statute, its vice is certainly not eradicated by the promptest publicity. If, on the other hand, such an agreement is innocent, it does not become guilty merely because the parties to it keep their own counsel about their mutual transactions.

It is contended that the case at bar is not within the statute, since the various combinations complained of deal primarily with manufacture; and *United States v. Knight*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, is cited in support of that proposition. It seems to the writer, however, that subsequent decisions of the Supreme Court have modified the opinion in that case, and that the one at bar is as much within the statute as was the combination condemned in *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488. Relief under the statute should be granted against the several domestic corporations defendant.

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The Imperial Tobacco Company of Great Britain and Ireland, Limited, is one of the defendants. It is a British corporation and entered into a contract with the American Tobacco Company in the city of London, where such contract was a legal and proper one. It is apparently the contention of petitioner that subsequent acts of the Imperial Tobacco Company in this country practically amount to the entering into a combination or contract of the sort specified in the statute. So far as appears the only transactions of that company here are these: It buys leaf tobacco of the American grower in very large quantities by its own independent force of purchasing employes. It does not sell its manufactured products here—indeed, such products, having to pay both tariff duties and revenue tax, could not be sold here except at a loss, save in the case of a few fancy high-priced brands. It may be an enlightened public policy to prohibit an alien corporation from buying its raw material in this country unless it sends its products here to compete with American manufacturers; but, if it be, this act seems not to have gone to that extent. The petition should be dismissed as to the Imperial Tobacco Company. A like disposition should be made as to the British-American Company.

[704] As to relief: In the main brief it is prayed that the domestic defendants the American Tobacco Company, American Snuff Company, and others enumerated, should be restrained from carrying on interstate or foreign commerce until conditions existing before illegal contracts or combinations were entered into are restored. Such relief is certainly drastic enough and should be efficient. In the petition it is prayed that receivers be appointed for the various companies, who apparently are to conduct a tobacco business and create some sort of artificial competition to take the place of the natural competition which, it is alleged, was destroyed by the combinations. Such a scheme seems impracticable and is wholly unnecessary.

I concur with Judge Coxe in his reasoning and conclusions touching the United Cigar Stores Company and the R. P. Richardson, Jr., Company, and agree that issuance of injunction should be suspended until after decision on appeal.

Coxe, C. J., concurring.

COXE, Circuit Judge (concurring).

As we are unanimous in thinking that the testimony shows no case for a receiver and that the bill should be dismissed as to the defendants, the Imperial Tobacco Company and the British American Company, nothing need be added to what Judge Lacombe has written in arriving at these conclusions. I concur with him in the result reached as to the other defendants except in some minor particulars which will be noted hereafter.

The "Tobacco Trust," so called, consists of over 60 corporations, which, since January, 1890, have been united into a gigantic combination which controls a greatly preponderating proportion of the tobacco business in the United States in each and all its branches; in some branches the volume being as high as 95 per cent. Prior to their absorption many of these corporations had been active competitors in interstate and foreign commerce. They competed in purchasing raw materials, in manufacturing, in jobbing and in selling to the consumer. To-day those plants which have not been closed, are, with one or two exceptions, under the absolute domination of the supreme central authority. Everything directly or indirectly connected with the manufacture and sale of tobacco products, including the ingredients, the packages, the bags and boxes, are largely controlled by it. Should a party with moderate capital desire to enter the field it would be difficult to do so against the opposition of this combination. That many of the associated corporations were not coerced into joining the combination but entered of their own volition is quite true, but in many other instances it is evident that if not actually compelled to join, they preferred to do so rather than face an unequal trade war in which the odds were all against them and in which success could only be achieved by a ruinous expenditure of time and money.

The power to destroy a too formidable rival, assuming that the allied companies see fit to exercise it, can hardly be denied. We are not dealing with these companies as they existed prior to 1890 but with the consolidated unit control-

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ling a preponderating proportion of the tobacco business in its most minute details. Prior to that date the manufacturing companies, the purchasers, the distributors and [705] the selling companies were each and all operating independently and tobacco products were being transported back and forth to every state of the Union and to foreign countries. Since 1890 this vast interstate and foreign trade which was formerly carried on by this large number of competing companies and individuals is now carried on by one combination. The free interchange of commerce has been interfered with, hampered, diverted and, in some instances, destroyed. Though it may be greater in volume it does not flow through the old channels, it is not free and unrestrained. It may be true that there are individual members of this combination not engaged in interstate commerce—manufacturing companies merely and therefore not engaged in commerce within the rule enunciated in *United States v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325. But here the complaint is made not against the individual conspirators separately but against the combination as a whole. Has it monopolized or restrained any part of interstate or foreign commerce? If so, it would seem that it is liable under the act. To illustrate, A is a manufacturer of tobacco in New York, B is a buyer of raw material in Kentucky, C is a jobber in Pennsylvania and D is a retailer in Boston. B sends the leaf tobacco from Louisville to New York, A manufactures it into smoking and chewing tobacco and sends it to C at Philadelphia, who in turn ships it to D at Boston, who sells it to the public. Should A, B, C and D enter into a copartnership to do as a firm what they had hitherto done as individuals can there be a doubt that the firm would be engaged in interstate commerce?

The defendants, with the exception of the Imperial Company, the Cigar Stores Company and the Richardson Company, admit as follows:

"We admit that all the vendors and corporation defendants mentioned in the petition as engaged in the manufacture and sale of tobacco products, except Imperial Tobacco Co., Ltd., purchased or now purchases some or all of the requisite raw material in states or countries other than those in which the factories were or are located

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and had or has it transported thence through the medium of common carriers to said factories, and employed or employ traveling salesmen who solicited or solicit in states or countries other than those in which the factory was or is located, orders for the tobacco products which by them were or are transmitted to said factory or other chief office of the manufacturer, and, if approved, they are filled by the delivery of the goods to a common carrier where the factory was or is located, duly consigned to the purchaser, title passing to said purchaser on said delivery to the common carrier."

If the contention of the defendants, that this does not constitute interstate commerce be correct, then it would seem to follow that no one can be engaged in such commerce unless he be a carrier, common or private, between the states. In the illustration just given it seems to be conceded, if one of the partners had been a common carrier owning a ferry, for instance, by which the goods were carried across the Ohio river, and this business had been taken over with the rest, that the firm would be engaged in interstate commerce. If, however, it employs others to carry its goods from state to state it is argued that it is not so engaged. In other words, although the so-called "Tobacco Trust" is buying raw material and selling its completed products in the market of the world, it is not engaged in "trade or commerce among the several states or with foreign nations" because carriers are employed to convey the goods from state to state and to foreign countries. I can not but think that this is too narrow a construction. Should it obtain, the statute will be eviscerated. No matter how odious or complete the monopoly, it will be immune from punishment if it can show that others have been employed to distribute its goods.

It is not an answer to say that the remedy may be applied by the states, for the reason that by the Constitution, to Congress is delegated the sole power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." In this domain the law of the national legislature is supreme and the states have no power to interfere. Dealing as it does with national and international commerce, the law must be unaffected by local conditions and it must be uniform. The conditions surrounding interstate commerce differ so materially in the various sections

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of the Union that it is not to be expected that anything like uniformity can obtain without the action of Congress.

At present the state laws are not harmonious and are as numerous as the states. In some of the states the tendency is to encourage commerce, in others to harass it with vexatious requirements. The framers of the Constitution were well aware of all this when they relegated the control of interstate commerce to the exclusive control of the national legislature.

The duty of this court is to ascertain the true meaning of the Anti-Trust Act as expounded by the Supreme Court and, as so interpreted, to enforce it.

The *Knight case*, supra, which is principally relied on by the defendants was the first case under the act to reach the Supreme Court. It was decided in January, 1895, and held in substance that the combination of a number of refineries to manufacture sugar was not within the act because manufacture alone is not commerce and therefore not within the control of Congress. The facts are similar to those relating to the absorption of several of the corporations in the case before us but not similar to all for the reasons which have been alluded to. In the *Knight case* it was held that commerce was only incidentally affected. Mr. Justice Harlan in his dissenting opinion thus defines interstate commerce:

"Interstate commerce does not, therefore, consist in transportation simply. It includes the purchase and sale of articles that are intended to be transported from one state to another—every species of commercial intercourse among the states and with foreign nations."

The facts clearly bring the case at bar within this definition for the raw materials and the manufactured products were not only intended to be transported from one state to another but actually were transported, in many instances, before the title had passed from the manufacturer to the jobber, retailer or consumer. It is interesting to note that the Chief Justice, who wrote the opinion of the court in the *Knight case*, also wrote the unanimous opinion in *Loewe v. Lamlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, which is the latest exposition of the law.

[707] An examination of the numerous decisions since the *Knight case* leads to the conclusion that there has been a gen-

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eral tendency towards a broader and more liberal construction of the statute. In the *Northern Securities case*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, the opinion is written by Mr. Justice Harlan who dissented in the *Knight case*. The previous decisions of the court are by him carefully reviewed and the point ruled in each is clearly stated. Of the *Knight case* it is said:

"It was held that the agreement or arrangement there involved had reference only to the manufacture or production of sugar by those engaged in the alleged combination, but if it had directly embraced interstate or international commerce, it would then have been covered by the Anti-Trust Act and would have been illegal."

He reviews all the prior decisions and formulates certain propositions which, in his opinion, are plainly deducible therefrom (page 331 of 193 U. S., page 436 of 24 Sup. Ct. [48 L. Ed. 679]). Some of these are as follows:

The Anti-Trust Act embraces and declares to be illegal every contract combination or conspiracy, in whatever form, of whatever nature and whoever may be the parties to it, which directly or necessarily operates in restraint of interstate or international trade or commerce. The act is not limited to unreasonable restraints but embraces all direct restraints.

The natural effect of competition is to increase commerce and an agreement whose direct effect is to prevent this play of competition restrains trade and commerce. To vitiate such an agreement or combination it is not necessary to prove a total suppression of trade. It is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition.

Of course the facts in the *Northern Securities case* differ essentially from those in the case at bar; but the language used in the opinion leaves little doubt that had the present combination been before the court, the majority would have declared it illegal. For instance the court says (page 337 of 193 U. S., page 457 of 24 Sup. Ct. [48 L. Ed. 679]):

"In all the prior cases in this court the Anti-Trust Act has been construed as forbidding any combination which by its necessary oper-

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ation destroys or restricts free competition among those engaged in interstate commerce; in other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce."

In *Loewe v. Lawlor* the court held the act applicable to members of a labor organization who by means of a boycott were endeavoring to destroy the business of a manufacturer of hats. The defendants were in no way engaged in interstate trade or commerce and the plaintiffs made hats in Connecticut and sold them in that and other states. So far as the business affected is concerned, the only distinction between the *Knight case* and the *Loewe-Lawlor case* is that in one the acts complained of related to the manufacture and sale of sugar and in the other to the manufacture and sale of hats.

[708] The act cannot be invoked unless interstate or foreign trade or commerce is involved, and the court decided that interstate commerce was involved in *Loewe v. Lawlor* although the case was presented on demurrer to the complaint, which alleged that the complainants resided at Danbury, Conn., and were "located and doing business as manufacturers and sellers of hats there." It was held, without dissent, that a combination to boycott the goods of the Danbury manufacturers, and prevent their sale in states other than Connecticut, was in restraint of interstate trade.

Of course, the facts differ materially, but the decision of the later case renders untenable the broad construction of the *Knight case* contended for by the defendants, viz., that in no instance where a manufacturing corporation is concerned can relief be granted for the reason that interstate commerce though indirectly affected, is not sufficiently involved to justify proceedings under the act.

Since the *Knight case* the tendency has been constantly towards a wider scope for the statute and I cannot believe that it is so important that it can be evaded, by the mere manipulation of a bill of lading—enforceable when a combination of manufacturers transports its products to other states and sells them there and utterly ineffectual if the precaution be taken to see that the title passes to the purchaser at the place of manufacture.



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But even if it be conceded that the doctrine of the *Knight case*, strictly construed, was applicable to some of the absorbed corporations and copartnerships, it certainly was not applicable to all, as some of them were unquestionably engaged in importing and selling their products by means of international and interstate commerce and there can be little doubt that the combination considered as a unit is so engaged. When merchandise is shipped from one state to another it seems obvious that the consignor or consignee is engaged in interstate commerce, or that both are so engaged. It cannot be that none of the parties, who set the wheels of transportation in motion on land and sea, is engaged in commerce and that Congress intended that the act should apply solely to common carriers. And yet, if no one can engage in trade or commerce between the states unless the actual physical transportation of the merchandise is done by him, it is obvious that the act can have no broader interpretation.

The law should not be defeated by a mere fiction. When a large number of independent corporations, firms and individuals are engaged in purchasing and manufacturing tobacco in several states and selling it in every part of the United States and in foreign countries, it seems clear that this is done through the instrumentality of interstate and foreign commerce. Without such commerce the business could not be conducted for a moment, the raw material would be left to rot in the warehouse, the manufactured product in the factory. The free interchange of these commodities, wherever they may be needed for barter or sale, is the life of the enterprise. Trade is the business of exchanging commodities by buying and selling for money. Interstate trade is the business of buying, selling and exchanging commodities between the states, and parties may be so engaged even though they act through [709] the agency of carriers. If then, the business of the independents above referred to be destroyed, interstate trade and commerce is destroyed to that extent, if the business of one or more of them be destroyed, interstate trade and commerce is destroyed pro tanto; in other words, there is less interchange of tobacco and its products between the states.

Coxe, C. J., concurring.

If I am right in thinking that many of the constituent companies were engaged in interstate commerce and that the breaking up of their business would inevitably affect the commerce of the country, it follows that their consolidation must produce a like result. The combination which has thus checked and hindered commerce and restrained its free circulation, has been guilty of a "restraint of trade or commerce among the several states," within the meaning of the act as interpreted by the Supreme Court. For these reasons I think an injunction should issue.

I am of the opinion, however, that it should not issue against the United Cigar Stores Company and should not issue, at least for the present, against R. P. Richardson, Jr., Company. In May, 1901, George J. Whelan and associates organized the United Cigar Stores Company for the purpose of retailing cigars and tobacco. This was done without the knowledge of the American Tobacco Company which refused to assist the enterprise in any way until its success as a selling agent was clearly demonstrated and established. It was at the suggestion of Whelan, not of the Tobacco Company, that its money was invested in the enterprise. Thereupon the Tobacco Company acquired a controlling interest in the Stores Company which has been held continuously and has been increased from time to time. Whelan and his associates have the active management of the Stores Company which deals in the products of the defendants and also of independent manufacturers. No member of the Tobacco Company or of its subsidiary companies is a member of the board of the Cigar Stores Company, and the evidence falls far short of establishing the proposition that the stores are managed in the interest of the Tobacco Company to the exclusion of other manufacturers. On the contrary, the weight of testimony is to the effect that the aim and purpose of the stores is to furnish anything that a user of tobacco may desire no matter by whom made. The company operates about 400 stores scattered throughout the United States but when it is realized that there are in this country over 600,000 places where tobacco is sold the impossibility of monopolizing the retail trade by one who operates only six-tenths of 1 per cent of these places will at once be apparent.

Coxe, C. J., concurring.

It cannot be assumed that a company which sells the products of all alike intends to secure a monopoly for one. Neither is the fact that the business is conducted in a large number of stores important.

The statute was not intended to strike down enterprise or to prevent the restraint of trade by destroying it. Many large merchants find it profitable to conduct their business through a chain of stores and it has never been held that the mere fact that a business is large and is extended over a wide territory renders its promoters amenable to the statute. Success is not a crime. Eliminating the fact that the Tobacco Company has a large pecuniary interest in the Stores Company, [710] there is absolutely nothing left upon which to base the charge of a conspiracy to restrain and monopolize trade.

I cannot believe that the fact that a corporation, assuming it to have combined with others to restrain trade, invests its money in the business of another corporation engaged in selling its goods and those of others fairly to the public is of itself sufficient to convict the latter corporation of entering into a conspiracy to monopolize interstate commerce. If the business of the United Stores Company was and is legitimate, it cannot be condemned simply because the Tobacco Company has, in other respects, been guilty of unlawful conduct. The Cigar Stores Company and the Tobacco Company were not and could not be competitors; the former manufactures and sells tobacco by the wholesale, the latter sells whatever its customers want, no matter by whom manufactured, at retail only. It is true that the Cigar Stores Company has been energetically and, perhaps, aggressively managed; it is true that a part of the business thus built up would have been done by others had the company not been formed; but this is true of every large and successful business. Prosperity is the premium which has always been awarded to earnest and intelligent endeavor. The statute was never intended to punish success or reward incompetency. The proof fails to establish unfair or unlawful methods in acquiring and conducting the business of the Cigar Stores.

Coxe, C. J., concurring.

There were a few instances in which a business was purchased and, as the vendor was to continue in charge, a covenant was taken binding him not to engage in business in that locality on his own behalf. Such transactions are not forbidden. In the *Joint Traffic case*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259, the court says, at page 567 of 171 U. S., at page 31 of 19 Sup. Ct. (43 L. Ed. 259) :

"It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade. We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term; and the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the *Trans-Missouri case*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, as a contract not within the meaning of the act; and it was said that such a contract was collateral to the main contract of sale and was entered into for the purpose of enhancing the price at which the vendor sells his business."

No special privileges are accorded by the Tobacco Company to the Cigar Stores Company over other purchasers. Its business is conducted in its own way, without dictation from the Tobacco Company. I do not overlook certain sporadic instances of fault finding and attempted interference in the business by certain officers of the Tobacco Company but these attempts were negligible and should not be considered in determining the general character of the business. Generally speaking the relations existing between the two were those of a manufacturer and a retail customer, to whom the manufacturer sells direct. In short, the only circumstances which distinguish the Stores Company from other large dealers in the Tobacco Company's products [711] is that a majority of its stock is owned by the latter, and, as we have seen, this is insufficient to convict it under the law.

No injunction should issue against the R. P. Richardson, Jr., Company, at least for the present, for the following reasons: Very soon after a controlling interest in the Richardson Company had been purchased by the Tobacco Company disputes arose as to the terms and conditions of the agree-

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ment, which resulted in a suit being commenced by the Richardson Company in the courts of North Carolina for the purpose of having the contracts and agreements between the companies set aside and the status existing prior to the negotiations restored. This was followed shortly afterwards by a suit by the Tobacco Company in the courts of New Jersey to compel the Richardson Company to transfer a controlling interest in its stock to the Tobacco Company. Both of these actions are pending and undetermined, the prosecution of the North Carolina action having been enjoined by the New Jersey court. It is manifest that the trial of these actions, or one of them, may dispose of the issues now pending and that if the Richardson Company succeeds in establishing the fraud and misrepresentation alleged, relief may be granted which this court has not jurisdiction to grant. The issuing of the injunction should, therefore, be suspended until the hearing and determination of the actions in the state courts.

In view of the importance of the questions involved and the certainty that the case will be carried to the Supreme Court I think the injunction should not issue pending the hearing and decision in that court.

Noyes, Circuit Judge (concurring).

The modern tendency of business is toward co-operation, instead of competition. This tendency, while of earlier inception, has developed with phenomenal activity in this country during the past 20 years—especially during the past decade. Concentration of interests and unification of control have taken the place of separate and independent operation. Important industrial corporations, formerly competing, have been combined into greater companies of wider scope, and these, in turn, have been united into combinations with vast resources, embracing, as their fields of operation, whole branches of industry.

And yet this economic development toward the elimination of competition has taken place in the face of statutes and judicial decisions declaring that "competition is the life of trade" and must be preserved. Combinations to prevent competition have always been declared contrary to public policy by the courts, and Congress, in the anti-trust statute

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of 1890, shortly after the inception of this economic movement and in view of the "trusts" of the period, went further than the common law and made those combinations which before had only been negatively unlawful positively criminal.

In so far as combinations result from the operation of economic principles, it may be doubtful whether they should be stayed at all by legislation. It may be that the evils in the existing situation should be left to the remedies afforded by the laws of trade. On the other hand, [712] it may be that the protection of the public from the operations of combinations of capital—especially those possessing the element of oppression—requires some measure of governmental intervention. It may be that the present anti-trust statute should be amended and made applicable only to those combinations which unreasonably restrain trade—that it should draw a line between those combinations which work for good and those which work for evil. But these are all legislative, and not judicial, questions. It cannot be too clearly borne in mind that this court has nothing to do with the wisdom, justice, or expediency of the statute. Equally true is it that this court, in applying the statute, must follow the decisions of the Supreme Court. If the decisions of that court have been too broad, it is for that court alone to modify them. The only right and duty of this court is to take the statute as it finds it, and, as it finds it, apply it in accordance with the interpretation placed upon it by the highest judicial tribunal. That this course may lead to results believed by many persons to be prejudicial to the public welfare cannot affect our action. This court can neither refuse to enforce a constitutional act of Congress nor ignore the decisions of the Supreme Court of the United States.

In approaching the consideration of the legal questions involved in this case, the inquiry of primary importance is met at the threshold: Are the defendants so engaged in interstate commerce that they are amenable to federal laws? Only in case they are so engaged is the consideration of other questions necessary. The examination of this fundamental question may well proceed upon the theory that the allegations of the petition are true—that the defendants have combined, and by combining have obtained practical con-

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trol of the tobacco industry of the country. However comprehensive or oppressive the combination may be, unless it affect interstate commerce, it is not subject to the federal anti-trust statute.

There are many definitions of interstate commerce. This from *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 208, 5 Sup. Ct. 826, 828, 29 L. Ed. 158, has been repeatedly approved:

"Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities."

The inquiry, then, is whether the record here shows "traffic" between citizens of different states, or the "purchase, sale, and exchange of commodities" across state lines.

The testimony discloses that the business of the defendants has three broad phases: (1) The purchase of the raw materials and supplies. (2) The manufacture of the product. (3) The disposition of the product. While the second phase—that of manufacture—does not involve interstate commerce, the other two phases seem clearly to directly involve it; and it also seems clear that the three phases are of equal importance. Unlike a mere manufacturing combination, this combination relates quite as much to the purchase of materials and the disposition of the product as to manufacture.

Leaf tobacco is purchased by the defendants' agents in tobacco markets, or directly from the grower in many different states, and is shipped by means of common carriers to factories or warehouses in other states. Licorice root for making licorice paste—necessary in producing certain kinds of tobacco—is purchased by a subsidiary corporation in foreign countries and is shipped to factories in this country. The paste, when manufactured, is sold to other of the defendants and is shipped to factories in different states. A subsidiary corporation manufactures tin foil and sells and ships it to the different factories. Another does the same thing with boxes, and another with cotton bags. Still another acts strictly as a purchasing corporation, and buys supplies in many markets, and sells and delivers them to the

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factories, warehouses, and offices throughout the country. The record shows constant intercommunication between the members of the combination in different states and constant shipments across state lines from one member to another as vendor and vendee.

The tobacco products manufactured by the defendants are largely sold by traveling salesmen, who solicit orders which, in most instances, are filled by shipping the goods ordered, by means of common carriers, from factories or warehouses located in states other than those in which the orders are taken. A limited number of jobbers in different states are also controlled, as well as an important retailer operating in different states. The business of the defendants covers the whole of the United States and the disposition of their products is effected under the supervision of an office of central authority by constant interstate shipments of the different commodities from factory, warehouse, or branch, to jobber, retailer, or consumer.

These facts seem clearly to show traffic between citizens of different states, and the purchase, sale, and exchange of commodities across state lines—to show that the defendants are directly engaged in commerce among the states and are subject to the federal anti-trust statute; and, as a practical matter, it is probable that a large part of the interstate shipments of the country are made by industrial combinations similar to that of the defendants. "Transactions between manufacturing companies in one state, through agents, with citizens of another, constitute a large part of interstate commerce." *Caldwell v. North Carolina*, 187 U. S. 622, 632, 23 Sup. Ct. 229, 233 (47 L. Ed. 336). If these corporations are not so engaged in interstate commerce as to be subject to federal regulation, then Congress, under the commerce clause, has little power except over carriers.

A point is made that this combination did not engage in interstate commerce in respect of sales made by traveling salesmen, because the title to the goods sold passed to the consignee when delivery was made to the common carrier in the place of manufacture. But the defendants engaged in interstate commerce when they sent their salesmen into



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different states and accepted and filled the orders obtained. "The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce." *Robbins v. Shelby Taxing District*, 120 U. S. 489, 497, 7 Sup. Ct. 592, 596, 30 L. Ed. 694. The sale of goods, by sample or otherwise, in one state by a traveling salesman employed by a manufacturer located in another state, and their subsequent shipment from the latter to the former state, constitute commerce among the states, with which Congress alone has power to deal. The Supreme Court of the United States has repeatedly held that state laws taxing or imposing conditions upon such sales are unconstitutional, as trenching upon the powers of Congress. Thus the court, in *Robbins v. Shelby Taxing District*, supra, said:

"If the selling of goods by sample and the employment of drummers for that purpose injuriously affect the local interest of the state, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it; for it is obvious that such regulations should be based on a uniform system applicable to the whole country, and not left to the varied discordant, or retaliatory enactments of 40 different states. The confusion into which the commerce of the country would be thrown by being subject to state legislation on this subject would be but a repetition of the disorder which prevailed under the Articles of Confederation."

See, also, *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719; *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. Ed. 368; *Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336; *Rearick v. Pennsylvania*, 203 U. S. 507, 27 Sup. Ct. 159, 51 L. Ed. 295.

Where the title to the goods sold by the salesman technically passes cannot, therefore, be regarded as important, "commerce among the states is a practical conception, not drawn from the 'witty diversities' (Yelv. 33) of the law of sales" (*Rearick v. Pennsylvania*, supra). Moreover, the facts bring the case within the language of *Swift v. United States*, 196 U. S. 375, 399, 25 Sup. Ct. 276, 280, 49 L. Ed. 518:

"But the allegations of the second section, even if they import a technical passing of title at the slaughtering places, also import that the sales are to persons in other states, and that the shipments to

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other states are part of the transaction—'pursuant to such sales'—and the third section imports that the same things which are sent to agents are sold by them, and sufficiently indicates that some at least of the sales are of the original packages. Moreover, the sales are by persons in one state to persons in another."

But still, if the technicality is important, the record shows, as we have seen, continued shipments of raw materials and finished products across state lines from one constituent corporation to another—constant purchases of materials, supplies, and products. If the combination as a shipper is not directly engaged in interstate commerce, then as a consignee it is so engaged, and the same result is reached.

Assuming, however, that these defendants are not directly engaged in interstate commerce, and are thus beyond the reach of the federal statute, what is the situation? Simply this: That there is no power—state or national—of practical efficiency which can reach industrial combinations, no matter how oppressive they may be. The result necessarily follows from the operation of the commerce clause of the Constitution. As we have just seen, the Supreme Court has held that state laws imposing conditions upon the sale of goods to be shipped into a state by a foreign vendor are unconstitutional, as trenching upon the powers of Congress. If such a sale is interstate commerce to the extent that it is free from local regulation, and yet the combination making [715] it is not so directly engaged in interstate commerce as to be subject to federal control, then there is a hiatus in power which leaves the combination above the law.

The business of a producing combination, in so far as it affects states other than those in which its plants are located, consists in the sale and delivery of its products. If it may sell its goods by shipment across state lines free from local laws, it may freely do business in states with whose laws and policy it is wholly antagonistic. The police power could not be extended to reach it. Inspection laws and statutes regulating the sale of injurious articles would be ineffective. Such a combination might locate its factory over the boundary line of a state, and, operating from there, adopt the most oppressive tactics to stifle local competition. If the

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commerce clause ties the hands of the states, and yet fails to give Congress efficient power, its effect is to force upon the whole country the standard of the state which charters the combination or of that in which its plants are located—standards which, as limiting the power of the combination, might impose no limitation at all.

I cannot accept this conclusion. In my opinion that which the Constitution took from the states it gave to the nation. There was no loss of power in the transmission. There is no middle ground. The business of the defendants in selling their goods and buying their materials, involving interstate dealings not subject to state anti-trust statutes, is interstate commerce, subject to the federal anti-trust statute.

But it is contended that the question whether the defendants are directly engaged in interstate commerce is settled by the decision of the Supreme Court in *United States v. E. C. Knight Company*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325. I do not so regard the effect of that decision. As I view it, the opinion of the majority of the court turned upon the distinction between manufacture and commerce, and treated the case as one relating solely to manufacture within a single state. As said by the court (page 17 of 156 U. S., page 255 of 15 Sup. Ct. [39 L. Ed. 325]):

“What the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several states or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the states or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce.”

The object of the proceedings in that case was, not to reach the American Sugar Refining Company as an unlawful combination, but to prevent the acquisition by it of local manufacturing properties. It is true that it appeared, incidentally, that the article manufactured was intended for transportation beyond the state; but no combination relating either to the purchase and interstate shipment of raw materials or to the disposition of the finished product was shown.

Noyes, C. J., concurring.

Upon the facts shown in this record the principles of the *Addyston Pipe case* (175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136) rather than those of the *Knight case*, seem applicable.

[716] These defendants are not a combination relating solely to manufacture, nor solely of manufacturers. As already shown, the combination embraces dealers as well as manufacturers, and producers of materials and supplies as well as of the finished tobacco products. The language of the Supreme Court in *Montague & Co. v. Lowry*, 193 U. S. 38, 47, 24 Sup. Ct. 307, 310, 48 L. Ed. 608, distinguishing the *Knight case*, is applicable:

"It was not a combination or monopoly among manufacturers simply, but one between them and dealers in the manufactured article, which was an article of commerce between the states. *United States v. E. C. Knight Company*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, did not, therefore cover it."

Furthermore, the recent decisions of the Supreme Court indicate that the *Knight* decision is inapplicable to a case like the present. Thus, in the *Northern Securities case*, 193 U. S. 197, 329, 24 Sup. Ct. 436, 453, 48 L. Ed. 679, Mr. Justice Harlan said of the *Knight* decision:

"It was held that the agreement or arrangement there involved had reference only to the manufacture or production of sugar by those engaged in the alleged combination; but, if it had directly embraced interstate or international commerce, it would then have been covered by the Anti-Trust Act and would have been illegal."

And in *Swift v. United States*, 196 U. S. 375, 397, 25 Sup. Ct. 276, 279, 49 L. Ed. 518, the court said:

"Although the combination alleged embraces restraint and monopoly of trade within a single state, its effect upon commerce among the states is not accidental, secondary, remote, or merely probable. On the allegations of the bill the latter commerce no less, perhaps even more, than commerce within a single state, is an object of attack. \* \* \* Moreover, it is a direct object. It is that for the sake of which the several specific acts and courses of conduct are done and adopted. Therefore the case is not like *United States v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, where the subject-matter of the combination was manufacture and the direct object monopoly of manufacture within a state."

See, also, *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488.

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In view of the world-wide business of these defendants, of the constant reaching out for new markets in new countries, of the many different industries in many different states involved, of the constant shipments of materials from state to state, and of the control of the disposition of the manufactured product, can it be said that the direct object of this vast combination—the dominating factor in the tobacco industry of the country—is the “monopoly of manufacture within a state”? I must answer this question in the negative. In my opinion the defendants are engaged in interstate commerce, and that which the combination directly affects is interstate commerce.

This conclusion ends the inquiry of the greatest moment in the case. It is of much importance to many people at the present time whether the defendants have entered into an unlawful combination. It is of the most momentous importance to all the people for all time whether the national government has power to reach industrial combinations dealing across state lines. Concede that the present statute goes too far. Concede, even, that no enactments are now necessary. Yet all must [717] agree that conditions may arise in the future requiring legislative action which shall be both uniform and effective. Congress alone could take such action, and if this case shall finally establish that the power exists in Congress to take it, then, regardless of all other results, it is a good thing for the future of this country that these proceedings were instituted.

Returning, now, to the charges against these defendants, and regarding it as settled that, if a combination or monopoly within the meaning of the anti-trust statute is shown, it directly affects interstate commerce, the next inquiry is whether such a combination or monopoly is established. In determining whether a combination, within the meaning of the statute, is shown, these propositions must be accepted as established by decisions of the Supreme Court of the United States:

(1) Every combination in restraint of interstate commerce, whether reasonable or unreasonable, is in violation of the statute. The present state of the law is thus summarized

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in the very recent case of *Shawnee Compress Co. v. Anderson*, 209 U. S. 423, 434, 28 Sup. Ct. 572, 575, 52 L. Ed. 865 :

"And it has been decided that not only unreasonable, but all direct, restraint of trade are prohibited, the law being thereby distinguished from the common law."

See, also, *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Northern Securities case*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679.

(2) Every combination restraining competition in interstate trade is a combination in restraint of interstate commerce. As said by Mr. Justice Harlan in the *Northern Securities case*, 193 U. S. 197, 337, 24 Sup. Ct. 436, 457, 48 L. Ed. 679:

"To destroy or restrict free competition in interstate commerce was to restrain such commerce."

And as stated by the court in *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 129, 25 Sup. Ct. 379, 382, 49 L. Ed. 689, in speaking of the purpose of the state and federal statutes against combination:

"According to them, competition, not combination, should be the law of trade. If there is evil in this, it should be accepted as less than that which may result from the unification of interests, and the power such unification gives."

This construction of the statute confines the duty of this court in applying it within very narrow limits. We have only to inquire whether the evidence shows a combination restraining competition. There is no necessity for going further. Other inquiries are immaterial. The combination may not reduce the prices paid to the growers of raw materials, may not increase the prices charged to consumers, may not seek to exclude all others from the field, may be free from coercion or oppression, and yet if it restrict competition, if it restrain trade, reasonable or unreasonably, it falls within the statute. The statute declares unlawful every combination in restraint of trade. It contains no words of limitation or qualification, and the Supreme Court of the [718] United States has decided that the courts have no right to attach them to it.

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In looking through the record for a combination which restricts competition, it is not necessary to go far. The defendants, in their own statement of that which they have done, present such a combination. In their brief (page 132) they say that their actions fall into two classes, of which the following is the first:

"The consolidation of interests, more or less sharply competitive, through the formation of a corporation and the transfer to it of the respective properties and business of such competitors."

A consolidation of competitive interests in this form, when a combination, as distinguished from a sale, is a combination which, restraining interstate commerce, violates the federal anti-trust statute. Whether a transaction amounts to a sale or to a combination depends upon whether the vendor parts with all interests in the business sold or merely changes the form of his investment. A bona fide sale of a plant for cash or its equivalent possesses none of the elements of combination. An exchange of one plant for an interest in united plants possesses all the elements of combination. See *Davis v. A. Booth & Co.*, 131 Fed. 37, 65 C. C. A. 269; *Bigelow v. Calumet, etc., Mining Co.* (C. C.) 155 Fed. 869; also, upon the underlying principle involved, *Shawnee Compress Co. v. Anderson*, 209 U. S. 423, 28 Sup. Ct. 572, 52 L. Ed. 865, and the *Northern Securities case*, *supra*.

The testimony in this case shows repeated instances where, upon the transfer of a competing business, the vendors merely changed the form of their investment. They transferred their property and received in exchange stock in the transferee corporation. They exchanged large interests in a small property for small interests in a large property. Instead of standing by themselves, they combined, and, in combining, violated the federal statute.

There is no especial merit in the corporate form of combination. A corporation without statutory authority—express or incidental—to acquire property cannot take it at all. With such authority it has only the power which an individual enjoys of natural right. Both may purchase and otherwise acquire property for lawful purposes; but neither can acquire property for a purpose forbidden by law. The cor-

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porations formed by the defendants, with the ordinary power to acquire all kinds of property, had no right to acquire property in order to form an unlawful combination. The grant of power would not be construed as authorizing any such acquisition; and any grant which went further, and did attempt to authorize the formation of a combination in violation of the federal statute, would be wholly void. No state can authorize any individual or corporation to break a law of the United States. See the *Northern Securities case*, supra. Upon the defendants' own presentation of their acts, therefore, I cannot avoid the conclusion that they have, with certain exceptions, engaged in a combination contrary to the first section of the federal anti-trust statute.

In thus considering whether the defendants have combined in violation of the first section of the act, they have been treated as an asso[719]ciation of corporations and individuals. But they are all dominated by the American Tobacco Company, and, in determining whether a monopoly has been created in contravention of the second section, they may properly be considered as a unit. In pursuing the latter inquiry, however, it is not necessary to go far. The violation of the first section requires the issuance of an injunction. No further relief could be granted, should the defendants be held to also violate the second section. The question of monopoly is, however, fully presented upon the briefs, and I think should not be passed over.

It appears from the record that the defendants produce 70 per cent of the smoking tobacco made in this country, 73 per cent of the cigarettes, 81 per cent of the plug and twist tobacco, 81 per cent of the fine-cut tobacco, 89 per cent of the little cigars, and 96 per cent of the snuff. They also make 95 per cent of the licorice paste produced, 75 per cent of the tin foil, and most of the tobacco extracts, boxes, and containers.

The acquisition by the defendants in taking over the various competing plants of most of the well-established and popular brands of tobacco gives them especial power to control the market. As pointed out in the defendants' brief:

"The difficulties of establishing a brand of tobacco are numerous, but they are compensated by the value of the brand when established."



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The consumer becomes accustomed to, and buys by, a brand. It is difficult to induce him to purchase another brand. "His habit is a 'Bull Durham' habit, and not a mere tobacco habit."

The defendants purchase the major part of all the tobacco leaf—other than that used for cigars—raised in this country. Of some important types they buy a very large proportion of the total production. Thus of burley, used in the manufacture of plug tobacco, they bought in 1905 175,000,000 pounds out of a total crop of 240,000,000 pounds; of Virginia sun cured, used for chewing tobacco, they bought 7,400,000 pounds out of a crop of 8,100,000 pounds. The hold of the defendants upon the tobacco industry of the country has steadily increased since the formation of the combination. There is only one branch of the industry which they do not have within their grasp—the cigar branch; but their predominating interest in all of the other branches is not lessened by the fact that they have not as yet obtained control of this branch. To create a monopoly, it is not necessary to gather in all the branches of a great industry.

In view of these facts, and of the further fact that the assets of the defendants amount to hundreds of millions of dollars, let us, with respect to the question whether they are monopolizing trade, again test their position from their own point of view. In examining the second section of the act the defendants in their brief (page 172) say:

"The sole question is: Do the defendants so engross the market that they can prevent others from engaging therein freely, and thus at pleasure fix the prices either of the raw materials or of the manufactured article?"

The record shows that, to establish and popularize a brand of tobacco, the expenditure of much time and money is necessary. Whether a person of moderate capital could successfully engage in the [720] manufacture of tobacco would depend entirely upon the position taken by the defendants. They might suffer him to succeed. On the other hand, they might deem it expedient to crush him, and, if they exercised the power which they possess, there could be but one result. Considering the enormous inherent and collateral power of the defendants, the record is remarkably free from acts of

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oppression or coercion. But still there is enough to show how a competitor can be brought to terms if occasion demands. The letters between the defendants' officials point out most effective means for entering "upon a vigorous campaign, to be kept up until the desired end is accomplished."

Under these conditions, I am of the opinion—in answer to the first phase of the defendants' question—that the defendants do so engross the tobacco market that they have power "to prevent others from engaging therein freely." The extent to which they have exercised their power is immaterial. The question presented by the defendants' inquiry is one of the existence of power, not its exercise.

Subject to the economic limit that prices cannot be fixed so low as to deprive the grower of inducement to raise future crops, the extent of the defendants' purchases of tobacco leaf necessarily gives them large power to fix the prices to be paid for the types which they require. Prices may be regulated—as the defendants assert—by the law of supply and demand; but the difficulty here is that the demand for many types comes, practically, from only one source. To whom, for example, can the growers of burley or Virginia sun-cured tobacco sell their crop, if they refuse the prices offered by the defendants? Similarly, the production by the defendants of by far the greater part of the tobacco used in this country gives the power to control the prices of the manufactured article, subject to the economic limit that, if placed too high, the consumer will give up the use of tobacco. It is not a question of going to another producer. No other producer could supply the amount required. Where will the users of snuff obtain it, if they are unwilling to pay the prices charged by the defendants?

Moreover, the defendants possess an even greater power over the prices of raw materials and finished products than the statistics which we have noticed indicate. It is apparent from the record that they are the dominating factors in the tobacco industry. Other producers are scattered and do not act together. They are not in a position to initiate price making.

They must follow the action of the defendants. Upon these facts, I am of the opinion that the second phase of the

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defendants' inquiry must, like the first, be answered in the affirmative—that the defendants do have power to determine the prices of raw materials and of the manufactured article.

Thus, applying to the defendants' position the test of their own inquiry, it follows that they constitute a monopoly. And the same result is reached if it be sought to bring them within the description of a monopoly stated by Mr. Justice McKenna in *National Cotton Oil Co. v. Texas*, 197 U. S. 129, 25 Sup. Ct. 382, 49 L. Ed. 689:

"Its dominant thought now is, to quote another, 'the motion of exclusiveness or unity'; in other words, the suppression of competition by the unifica- [721] tion of interest or management, or, it may be, through agreement and concert of action. And the purpose is so definitely the control of prices that monopoly has been defined to be 'unified tactics with regard to prices.' It is the power to control prices which makes the inducement of combinations and their profit. It is such power that makes it the concern of the law to prohibit or limit them."

Still another test brings us to the same conclusion. The authorities warrant the statement that a monopoly, in the modern sense, is created when, as a result of efforts to that end, previously competing businesses are so concentrated in the hands of a single person or corporation, or a few persons or corporations acting together, that they have power to practically control the prices of commodities and thus to practically suppress competition. *National Cotton Oil Co. v. Texas*, supra; *United States v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; *Northern Securities case*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679; *Swift v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518; *American Biscuit, etc., Co. v. Klotz* (C. C.) 44 Fed. 724; *United States v. Chesapeake, etc., Fuel Co.* (C. C.) 105 Fed. 104; *Chesapeake & O. Fuel Co. v. United States*, 115 Fed. 610, 53 C. C. A. 256; *People v. North River Sugar Refining Co.*, 54 Hun, 377, note 3 N. Y. Supp. 401, 2 L. R. A. 33; *Pocahontas Coke Co. v. Prowhatan Coal, etc., Co.*, 60 W. Va. 508, 56 S. E. 264, 10 L. R. A. (N. S.) 268, 116 Am. St. Rep. 901; *Richardson v. Buhl*, 77 Mich. 658, 43 N. W. 1102, 6 L. R. A. 457; *Harding v. American Glucose Co.*, 192 Ill. 615, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. Rep. 189; *Herriman v. Menzies*, 115 Cal. 16, 44 Pac. 660, 46 Pac. 730,

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35 L. R. A. 318, 56 Am. St. Rep. 81; *Lough v. Outenbridge*, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. Rep. 712; *Wood v. Greenwood Hardware Co.*, 75 S. C. 383, 55 S. E. 973, 9 L. R. A. (N. S.) 501. And the examination of facts already made shows this concentration of power in the hands of the defendants.

It must be noted that the authorities hold that the material consideration, in determining whether a monopoly exists, is not that prices are raised and that competition is excluded, but that power exists to raise prices or to exclude competition when it is desired to do so. The validity of an organization, according to the authorities—

“is not to be tested by what has been done under it, but by what may be done under it; not by its performance, but by its power of performance when fully exercised.” *Pocahontas Coke Co. v. Powhatan Coal, etc., Co.*, supra.

Following the authorities, the necessary result is that the defendants, in possessing the power of control over the tobacco market, monopolize interstate trade and commerce within the meaning and in violation of the second section of the statute. And yet, in view of the possible results from this interpretation of the statute, I could only with hesitation unqualifiedly adopt it. An aggregation of capital or property, with power to control the market for a product, might be brought about by lawful means without the element of combination, and might carry on its operations without the element of oppression. If the mere possession of power is the test of legality, then the inquiry in that case, as in any other case, would merely relate to the present status of the aggregation: What has it power to do!—with[722] out regard to its past history or its present methods. Thus a result might be declared unlawful, which was obtained by lawful means; an aggregation of capital criminal, which actually operated to the public benefit. The law that illegality depends wholly upon the power of performance may be settled; but it was not settled when the tendency towards the unification of interests was so marked as at the present time. It may be that now, in applying the second section of the statute, performance, as well as power of performance, should be considered; that the elements of oppression and

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coercion should be shown to exist, to establish an unlawful monopoly. And, if these elements are to be considered, they are not sufficiently presented upon this record. It is not shown that the defendants have reduced prices to growers, nor that they have raised prices to consumers. The instances of coercion which are shown appear rather as incidental to the development of a great business than as indicative of a policy of oppression. But a judicial opinion upon the important question whether the conclusion which the authorities lead to should be adopted without qualification in construing and applying the second section should only be expressed when necessary to the rendition of a decision. There is no such necessity in this case. In view of the opinions of the other members of the court, the decree must run against the defendants under the first, and not under the second, section of the statute. Therefore, while I have felt it my duty to examine the situation under the second section, its consideration need not be carried further.

The only matters remaining relate to the decrees. While not wholly adopting the views of Judges Lacombe and Coxe with respect to certain of the defendants, I concur in the results which they reach, and in their conclusion that an injunction of the nature stated should be issued against the defendants, with the exceptions noted, but with stay pending appeal.

WARD, Circuit Judge (dissenting).

I feel constrained to dissent from the judgment of the court in this case. The United States charges in its bill that the defendants have been and are engaged in an illegal combination to restrain and monopolize trade, in violation of an act of Congress passed July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]) known as the "Sherman Act," and prays for relief by injunction and otherwise. An outline of the acts complained of as evidencing a combination in restraint of trade and a monopoly is as follows:

In January, 1890, the American Tobacco Company was incorporated, to take over the business of five independent concerns engaged almost wholly in the manufacture of cigar-

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ettes. This company substantially covered the entire output of cigarettes in the United States. It is no defense that it was incorporated some six months before the passage of the Sherman act, if an illegal combination within the meaning of that act. *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007. There is no evidence that the combination was the result of cutting of prices or of a commercial war of any kind. The company from time to time bought [723] other plants engaged in manufacturing smoking tobacco and others engaged in manufacturing plug tobacco.

In 1898 the Continental Tobacco Company was incorporated, to take over the plug tobacco business of the American Tobacco Company and the business of five other independent concerns manufacturing principally plug tobacco. There had been a war in the way of cutting of prices in certain brands of plug tobacco, which probably had something to do with the formation of it. Subsequently the American Tobacco Company bought or obtained control of many plants engaged in the manufacture of smoking tobacco, and the Continental many plants engaged in the manufacture of plug tobacco. Some of them were absorbed, and others, like the defendants, continued their corporate existence.

In 1900 the American Snuff Company was incorporated, to take over the snuff business of the American Tobacco Company, of the Continental Tobacco Company, and of two other independent manufacturers.

In 1901 the American Cigar Company was incorporated, to take over the business of the American Tobacco Company and of Powell, Smith & Co. in manufacturing and selling cigars, cheroots, and stogies. In the same year the Consolidated Tobacco Company was incorporated, to take over as a holding company, in exchange for its bonds, substantially all of the stock of the American Tobacco Company and the Continental Tobacco Company.

In 1903 the American Stogie Company was incorporated, to take over the stogie business of the American Cigar Company, the American Tobacco Company, and the Continental Tobacco Company. In 1904 the American Tobacco Company, the Continental Tobacco Company, and the Consoli-

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dated Tobacco Company were merged into the present American Tobacco Company.

The companies above named, being the principal defendants, acquired control of the plants of many other concerns engaged in manufacturing or distributing tobacco, and also of concerns supplying things necessary in the tobacco business, such as tin foil, licorice root, and its products, bags, boxes, signs, and briar pipes. Most of the vendors of the tobacco plants entered into contracts not to engage in the business sold in certain territory for a certain time, which I regard as proper for the protection of the vendees.

Referring to the combination of 1904, which created the present American Tobacco Company, it is to be remembered that the Consolidated Company was a mere holding company, and the American Tobacco Company and the Continental Tobacco Company were in no sense competitors; the former being engaged in manufacturing cigarettes and smoking tobacco, and the latter in manufacturing plug and twist tobacco. Their merger was not in restraint of trade, unless it could be regarded as an illegal monopoly, because it produced from 60 to 90 per cent of the total output of the United States of the various articles it manufactured. The profits of the present American Tobacco Company and its controlled companies have been and are very large, and their business, excluding cigars, covers not less than [724] 75 per cent of the whole output of manufactured tobacco in the United States.

The government has offered in evidence a stipulation (Government's Exhibit No. 8) of all the defendants, except the Imperial Tobacco Company, the United Cigar Stores Company, R. L. Richardson Company, Incorporated, and W. C. Reed, which must be taken correctly to describe the way the business is done, there being nothing in the record to the contrary, as follows:

"We admit that all the vendors and corporation defendants mentioned in the petition as engaged in the manufacture and sale of tobacco products, except Imperial Tobacco Company, Limited, purchased or now purchases some or all of the requisite raw material in states or countries other than those in which the factories were or are located, and had or has it transported thence through the medium of common carriers to said factories, and employed or employ

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traveling salesmen, who solicited or solicit in states or countries other than those in which the factory was or is located orders for the tobacco products, which by them were or are transmitted to said factory or other chief office of the manufacturer, and, if approved, they are filled by the delivery of the goods to a common carrier where the factory was or is located, duly consigned to the purchaser; title passing to said purchaser on said delivery to the common carrier."

It can hardly be doubted that a manufacturer who makes his product of materials found within the state of manufacture and sells his entire product there is not engaged in interstate commerce. It will make no difference that the purchasers send and sell the manufacturer's product throughout the United States. Except that they buy their raw material in other states, this is the way the manufacturing defendants in this case do their business. Their business is manufacturing, and the fact that they get their raw material in other states and send agents to other states to solicit orders does not make their business interstate commerce. This certainly appears to be the view of the Supreme Court in the case of *United States v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325. In it the American Sugar Refining Company and four refineries in Philadelphia were all engaged in competition with each other in the importing of raw sugar into the United States, refining it, and selling it throughout the country. Their business was exactly like that of the principal defendants, except that it was in a necessary of life, instead of a luxury. A combination was made between the American Sugar Refining Company and the Pennsylvania refineries by the exchange of all their capital stock for shares of its capital stock. The monopoly was greater than in the case now under consideration, because the combination manufactured 98 per cent. of the entire sugar output of the United States. The bill averred that the American Sugar Refining Company monopolized the manufacture and sale of refined sugar in the United States, controlled its price, and had combined with the other defendants to restrain the commerce in refined sugar in the several states and foreign nations and to increase its price. The trial court (60 Fed. 306) found that:

"The object in purchasing the Philadelphia refineries was to obtain a greater influence or more perfect control over the business of refining and selling sugar in this country."



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[725] When the case reached the United States Supreme Court, Chief Justice Fuller, who delivered the opinion of the court, assumed that the transaction did constitute a monopoly, but held that it was a monopoly of the manufacture of a necessary of life. He said, at page 17 of 156 U. S., and page 255 of 15 Sup. Ct. (39 L. Ed. 325) :

"The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. It is true that the bill alleged that the products of these refineries were sold and distributed among the several states, and that all the companies were engaged in trade or commerce with the several states and with foreign nations; but this was no more than to say that trade and commerce served manufacture to fulfill its function. Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and other states, and refined sugar was also forwarded by the companies to other states for sale. Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce; and the fact as we have seen that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree. The subject-matter of the sale was shares of manufacturing stock, and the relief sought was the surrender of property which had already passed and the suppression of the alleged monopoly in manufacture by the restoration of the status quo before the transfers; yet the act of Congress only authorized the Circuit Courts to proceed by way of preventing and restraining violations of the act in respect of contracts, combinations, or conspiracies in restraint of interstate or international trade or commerce."

It is clear that the court recognized that the business of the defendants, though manufacturing, did incidentally, and not directly, embrace interstate commerce. If this fact sufficed to bring them within the Sherman Act, then almost every occupation may be regulated by Congress. The dissenting opinion of Harlan, J., proceeded principally upon the theory that the combination was necessarily one relating to the sale of goods, and raised every objection now relied upon by the government to the conclusion of the court.

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The majority of the court think that subsequent decisions, especially *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, have impliedly overruled the *Knight case*. In no subsequent decision has it been expressly qualified, and in the *Loewe case* Chief Justice Fuller, delivering the unanimous opinion of the court, said at page 279 of 208 U. S., and page 304 of 28 Sup. Ct. (52 L. Ed. 488) :

"We do not pause to comment on such cases as *United States v. Knight*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; *Hopkins v. United States*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290; and *Anderson v. United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300, in which the undisputed facts showed that the purpose of the agreement was not to obstruct or restrain interstate commerce. The object and intent of the combination determined its legality."

It has been suggested that the plaintiffs in the *Loewe case* must have been held by the court to have been directly engaged in interstate commerce, or otherwise the demurrer would not have been overruled, and, if they were directly engaged in interstate commerce, the defendants in the *Knight case* must have been so also; the only difference being that one manufactured sugar and the other manufactur[726]ed hats. But one need not be engaged in interstate commerce at all to get the benefit of the Sherman Act. Section 7 authorizes "any person who shall be injured in his business or property" by a violation of the act to bring just such a suit as *Loewe* brought. Although the plaintiffs, as manufacturers, might not have been engaged in business which would bring them within the operation of the Sherman Act, still a combination of third parties to restrain a part of their business incidentally embraced in interstate commerce might well bring that combination within the operation of the act. The decision in the *Loewe case* was unanimous, and, expressly approving the *Knight case*, proceeded upon the ground that the defendants' combination necessarily and directly restrained the purchases and sales of hats between the plaintiffs and citizens of other states. Chief Justice Fuller delivered the opinion in both cases. Three of the justices who were of the majority in the *Knight case* concurred in the *Loewe case*, and it can hardly be supposed that they were overruling the *Knight case* by implication.

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I think it conclusive in this case. If it be said this conclusion would leave great evils without correction, the answer is they may be corrected by the states or in the territories by the United States, because they can prevent monopolies and combinations in restraint of trade within their own borders, whether carried on by their own citizens or by others.

Assuming, however, that the *Knight* case does not apply, are the defendants within the prohibition of the first section of the Sherman Act? Undoubtedly the original American Tobacco Company and the Continental Tobacco Company (both of which have ceased to exist) and the American Snuff Company and the American Cigar Company were combinations of independent concerns; but every combination is obviously not within the act. The prohibition is against combinations whose purpose is to restrain trade. Such a combination is within the act, even if it fail to do so; while one whose purpose is not to restrain trade is not within the act, even if it incidentally does so. Intention is of prime importance, because the acts prohibited are made crimes. So far as the volume of trade in tobacco is concerned, the proofs show that it has enormously increased from the raw material to the manufactured product since the combinations, and, so far as the price of the product is concerned, that it has not been increased to the consumer and has varied only as the price of the raw material of leaf tobacco has varied.

The purpose of the combinations was not to restrain trade or prevent competition, although competition was incidentally prevented, but, by intelligent economies, to increase the volume and the profits of the business in which the parties were engaged. No agreements were entered into, as in many of the decided cases, that operated directly on interstate commerce through common carriers by maintaining rates or preventing competition, like *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, *United States v. Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259, and *Northern Securities Co. v. United States* 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, or which limited output of [727] manufacturers or

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regulated the prices at or the territory within which their output should be sold throughout the United States, as in *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, *Montague & Co. v. Lowrey*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608, and *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, or which sought to prevent any interstate commerce at all in the goods in question, as in *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488.

The case of *Shawnee Compress Co. v. Anderson*, 209 U. S. 423, 28 Sup. Ct. 572, 52 L. Ed. 865, on which the government relies, throws little light on the one under consideration. It was an appeal from the Supreme Court of the territory of Oklahoma, which court found as a fact that the lease in question was made in aid of a conspiracy to suppress competition and secure a monopoly. There is nothing to show whether the court was relying upon the common law, the trust act of the territory, or the Sherman Act. The Supreme Court felt itself confined to determining whether there was evidence to support the conclusion of the territorial court, and, finding that there was, affirmed the decree, Mr. Justice McKenna said, referring to the trial court:

"The court further said that it found 'ample authority in the record for that action,' and, following the rule 'often reiterated,' the court further said 'it must hold that, where a record contains some evidence to support the finding of the trial court,' the judgment will not be disturbed. The ruling sustaining the power of the Shawnee Company to execute the lease is attacked by appellees, but we do not find it necessary to express an opinion upon it, on account of the view we entertain of the second proposition. In passing on the second proposition the Supreme Court decided adversely to the view taken by the trial court. The court, therefore, must either have conceded that there was not some evidence supporting the conclusions of fact of the trial court, or must have deemed the principles of law which the trial court upheld were not sustained by its conclusions of fact. As our view in the nature of things is confined to determining whether the court below erred, it follows that our reviewing power under the circumstances is coincident with the authority to review possessed by the court below, and therefore we are confined, as was the court below, to determining whether there was some evidence supporting the find-

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ings, and whether the facts found were adequate to sustain the legal conclusions. *Southern Lumber Co. v. Ward*, 208 U. S. 126, 28 Sup. Ct. 239, 52 L. Ed. 420."

It remains to inquire whether the American Tobacco Company and its controlled companies constitute a monopoly of or attempt to monopolize a part of the foreign commerce or commerce between the states under the second section of the Sherman Act. As this section prohibits a monopoly of or an attempt to monopolize any part of such commerce, it cannot be literally construed. So applied, the act would prohibit commerce altogether. The first and second sections must be read together, and I think mean the same thing; the second adding nothing except to extend the prohibition to individuals who, without combination, monopolize or attempt to monopolize. It must be understood to prohibit monopolies or attempts to monopolize brought about by the unlawful means contemplated in the first section, viz., the purpose to restrain trade by preventing competition and preventing others from participating in it. The third section of the act bears out this [728] construction, because it does not mention monopolies or attempts to monopolize in the territories or District of Columbia, where the jurisdiction of the United States is supreme in all things, and it can hardly be that Congress intended to declare innocent acts committed within them which it pronounces crimes if committed in the states.

The purposes of the defendants should not be made to depend upon occasional illegal or oppressive acts or letters, but must be collected from their conduct as a whole. A perusal of the record satisfies me that their purposes and conduct were not illegal or oppressive, but that they strove, as every business man strives, to increase their business, and that their great success is a natural growth resulting from industry, intelligence, and economy, doubtless largely helped by the volume of business done and the great capital at command.

For these reasons, without considering others discussed by counsel, I think the bill should be dismissed. For final decree see 164 Fed. 1024.

## Decree of the Court.

UNITED STATES v. AMERICAN TOBACCO CO.  
ET AL.

(Circuit Court, S. D. New York. December 15, 1908).  
(164 Fed. Rep., 1024.)

The following is the substance of the decree of the Circuit Court in the above entitled case:

Second. That the defendants, other than those against whom the petition is dismissed, have heretofore entered into and are now parties to combinations in restraint of trade and commerce among the several states and with foreign nations in leaf tobacco, products manufactured therefrom, and articles necessary or useful in connection therewith, in violation of the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. p. 3200]). Wherefore, said defendants and each of them, their officers, agents, directors, servants, and employees, are hereby restrained and enjoined from directly or indirectly doing any act or thing whatsoever in furtherance of the objects and purposes of said combinations and from continuing as parties thereto.

Third. That each of the defendants, the American Tobacco Company, American Snuff Company, American Cigar Company, American Stogie Company, and MacAndrews & Forbes Company, constitutes and is itself a combination in violation of said act of Congress. Wherefore, defendants the American Tobacco Company, American Snuff Company, American Cigar Company, American Stogie Company, and MacAndrews & Forbes Company, together with the officers, directors, agents, and employees of each of them, are each and all hereby restrained and enjoined from further directly or indirectly engaging in interstate or foreign trade and commerce in leaf tobacco, or the products manufactured therefrom, or articles necessary or useful in connection therewith; but, if any of said last-named defendants can hereafter affirmatively show the restoration of reasonably competitive conditions, such defendants may apply to this court for a modification, suspension, or dissolution of the injunction herein granted against it.

## Decree of the Court.

Fourth. The American Tobacco Company has acquired and now holds and claims to own some or all of the capital stock of the following corporations, defendants herein: F. F. Adams Tobacco Company, etc. The American Tobacco Company also claims to own a majority of the capital stock of the defendant corporation R. P. Richardson, Jr., & Co., Incorporated. The American Snuff Company has acquired and now holds and claims to own some or all of the capital stock of the following corporations named as defendants herein: American Cigar Company, etc. The American Cigar Company has acquired and now holds and claims to own some or all of the capital stock of the following corporations named as defendants herein: Amsterdam Supply Company, etc. P. Lorillard Company has acquired and now holds and claims to own some or all of the capital stock of the following corporations, defendants herein: American Snuff Company and Amsterdam Supply Company. R. J. Reynolds Tobacco Company has acquired and now holds and claims to own some or all of the capital stock of the following corporations, defendants herein: Amsterdam Supply Company, Liipfert-Scales Company, and MacAndrews & Forbes Company. Blackwell's Durham Tobacco Company has acquired and now holds and claims to own some or all of the capital stock of the following corporations, defendants herein: Amsterdam Supply Company, F. R. Penn Tobacco Company, Scotton-Dillon Company, and Wells-Whitehead Tobacco Company. Conley Foil Company has acquired and now holds and claims to own some or all of the capital stock of the defendant Johnson Tin Foil & Metal Company. Wherefore each and all of defendants, the American Tobacco Company, and American Snuff Company, the American Cigar Company, P. Lorillard Company, R. J. Reynolds Tobacco Company, Blackwell's Durham Tobacco Company, and Conley Foil Company, their officers, directors, agents, servants, and employees, are hereby restrained and enjoined from acquiring, by conveyance or otherwise, the plant or business of any such corporation wherein any one of them now holds or owns stock; and each and all of said defendant corporations so holding stock in other corporations as above specified, their officers, directors, agents, servants, and em-

**Syllabus.**

ployees, are further enjoined from voting or attempting to vote said stock at any meeting of the stockholders of the corporations issuing the same, and from exercising or attempting to exercise any control, direction, supervision, or influence whatsoever over the acts and doings of such corporation. And it is further ordered and decreed that each and every of the defendant corporations the stock of which is held by any other defendant corporation as hereinbefore shown, their officers, directors, servants, and agents be, and they are hereby, respectively and collectively restrained and enjoined from permitting the stock so held to be voted by any other defendant holding or claiming to own the same, or by its attorneys or agents, at any corporate election for directors or officers, and from permitting or suffering any other defendant corporation claiming to own or hold stock therein, or its officers or agents, to exercise any control whatsoever over its corporate acts.

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**[803] DR. MILES MEDICAL CO. v. JOHN D. PARK & SONS CO.\***

(Circuit Court of Appeals, Sixth Circuit. September 10, 1906.)

[164 Fed. Rep., 803.]

**MONOPOLIES (§ 17)—CONTRACTS IN RESTRAINT OF TRADE—SALE OF PROPRIETARY MEDICINE.**—A system of contracts between the manufacturer of a proprietary medicine made in accordance with a secret formula but unpatented and all dealers authorized by it to handle such medicine, whether regarded as contracts of sale or agency, by which jobbers are prohibited from selling to any except retailers licensed by such manufacturer, and retailers are prohibited from selling to any save those licensed to buy or to persons buying for consumption only, and neither jobber nor retailer is permitted to sell except at prices imposed by the manufacturer, the purpose and effect being to maintain prices by preventing competition in price between either jobbers or retailers, where it affects interstate sales is illegal both at common law and under the federal Anti-Trust Act of July

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\* For opinion of Supreme Court, affirming judgment (220 U. S., 373), see vol. 4, p. 1.



**Syllabus.**

2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), as in restraint of trade.\*

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. § 17.]

**SALES (§ 7)—CONTRACTS—CONSTRUCTION—SALE OF BAILMENT.**—Contracts between the manufacturer of a proprietary medicine and jobbers dealing in the same which purport to be consignment contracts and to make the jobbers agents for the manufacturer and provide that title to the goods shall remain in the manufacturer until they are sold by the jobber to purchasers whom it has licensed to buy the same and at prices fixed by it, but which obligate the jobbers to pay a fixed price for the medicine without the right to return it and under which the title is retained even after the price has been paid or "advanced," are mere subterfuges to disguise purchasers in the mask of agency and to evade the law which would make open contracts of sale with the same restrictions upon resale illegal as in restraint of trade, and are in fact contracts of sale and not of agency.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 16, 17; Dec. Dig. § 7.]

Appeal from the Circuit Court of the United States for the Eastern District of Kentucky.

This is a bill by manufacturers of proprietary medicines who put them upon the market under a system of contracts intended to maintain the prices fixed by them. There are two forms of these contracts, one with wholesalers and another with retailers. Like contracts, it is claimed, have been made and signed by nearly all jobbers and retailers in the United States who deal in such goods. These contracts are set out at the close of the opinion.

The defendant company refuses to enter into any such agreement, and, according to the averment of the bill, illegally induces persons who have to violate their contracts by selling to him though unauthorized to buy and at prices below those which such persons are required to exact. It is also averred that for the purpose of protecting the seller from the consequences of a breach of contract the defendant company defaces the carton inclosing the medicine and destroys the evidence thereon or thereto attached by which, through a serial number, complainant might trace the seller who breached the contract. In addition, it is charged that defendant sells to retailers who carry on a "cut rate" business, who in turn retail to consumers at rates less than those at which complainant requires all retailers to exact from persons buying for use. The bill in all its important averments as to the manner in which complainant carries on its business and the advantages of such method and the evils of the "cut rate" business in such goods, as well as its averments as [804] to the knowledge

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## Opinion of the Court.

of the system possessed by the defendant, are substantially identical with the averments of the bill under consideration by this court in *Jno. D. Park & Sons Co. v. Hartman*, 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 1135. In the Hartman system of contracts, the contract between Hartman and the jobber was confessedly one of sale; under the Dr. Miles system, it is claimed, it is one of consignment or agency and not sale. With this distinction, if it exist, the opinion in the *Hartman case* may be referred to for a more detailed statement of the evils of the competitive or "cut rate" system and the advantages of the one price or noncompetitive plan which the complainant seeks to bring about by the system of contracts here involved.

The acts and conduct against which complainant seeks relief are identically the conduct complained of in the *Hartman case*, and the opinion in that case may be referred to for a more detailed statement of the case here made for relief. A demurrer to the bill was sustained upon the authority of the opinion of this court in the *Hartman case*.

*Frank F. Reed* (*Edward S. Rogers* and *Frederick W. Hinkle*, on the brief), for appellant.

*William J. Shroder*, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge (after stating the facts as above).

We see no substantial difference between the systems of contracts under which the Dr. Miles Medical Company is now conducting its business and that under which Dr. Hartman carried on his business as a manufacturer of Peruna, considered by this court at length in the case of *Jno. D. Park & Sons v. Hartman*, 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 1135. That case is pending, undecided, in the Supreme Court. The complainant's very learned counsel was the counsel for Hartman in that case, and both systems of contracts are most probably the fruit of his acknowledged skill in respect to this class of business arrangements. No difference whatever is suggested between the system of contracts considered in that case and those here presented, except, it is claimed, that the agreement with jobbers and wholesale dealers here involved is one of bailment or agency and not one of sale as in the *Hartman case*. If this were admitted, it does not, in our judgment, operate to legalize the "system" of which that agreement is but one part. The

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effect of that contract with jobbers, whether it be regarded as one of sale or of agency, is to restrain jobbers from selling to any save retailers licensed by complainant, and to restrain retailers from selling for resale to any save those licensed to buy or to persons who buy for consumption only, and to none, by either jobber or retailer, except at a price imposed by the manufacturer. The confessed object of this plan or system is to obtain a price to the jobber and to the retailer unaffected by any competition between them. The scheme is one to enhance or maintain prices by eliminating all possibility of competing rates between either jobbers or retailers, and is quite as effectual in its results as if the contract with the jobber was plainly one of sale.

But we are not disposed to concede that the contracts with jobbers are contracts of bailment. There are too many features which seem inconsistent with a mere agency or commission agreement. All the responsibility of an owner seems cast upon the so-called "consignee." He is not given the right to return goods unsold; that can be done only upon the cancellation of the contract and demand for return. The [805] retention of title for the security of the price would after all make the contract one of conditional sale, and the jobber would still be the general owner and responsible as such. Curiously enough, the actual payment of the price at which the consignment is billed is not to affect the title; it is still, under the contract, to remain with the so-called "consignor." Yet the heavy inducement of 5 per cent upon a very close class of goods is held out to induce a payment in advance of sales. It is difficult to believe, whatever the technical relation of the parties under such an agreement, and whatever the belief each may have had as to his relation to the other, that such jobbers were not in fact and law the general owners of goods so "consigned," and engaged in selling for themselves and not as the mere agents, *del credere* or otherwise, of the complainant. The scheme seems to be an effort to disguise the wholesale dealers in the mask of agency upon the theory that in that character one link in the system for the suppression of the "cut rate" business might be regarded as valid. Hardly any two contracts raising the question of sale or agency are so near alike as to make an

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opinion construing one an authority in another. It matters little what the parties call such agreements. Whether the result is a sale or an agency must depend upon the meaning and intent of the instrument as a whole. Looking at this agreement thus, we think the jobber must be regarded as the general owner and engaged in selling for himself and not as a mere agent of another. True, he must sell, if this system of doing business is valid and enforceable, as he obligates himself to do, but nevertheless he is selling for himself and upon his own account and risk. *Coweta Fertilizer Co. v. Brown* (decided at this term, and cases therein cited) 163 Fed. 162; *Ex parte White*, L. R. 1870, 6 Ch. App. Cases; *Mack v. Drummond Tobacco Co.*, 48 Neb. 397, 67 N. W. 174, 58 Am. St. Rep. 691; *Peoria Co. v. Lyons*, 153 Ill. 427, 38 N. E. 661; *Arbuckle v. Kirkpatrick*, 98 Tenn. 221, 39 S. W. 3, 36 L. R. A. 285, 60 Am. St. Rep. 854.

This case must, after all, turn upon whether there is such identity of character between the statutory monopoly of articles made under a valid patent or copyright and articles made according to some private formula as to exempt them from the principles which apply to contracts which tend to create a monopoly or restrain trade when the subject is an article not made under a patent or copyright or secret formula. A distinction exists between the extent of the protection granted by the patent and copyright statutes, and the copyright statute has been held "not to create the right to impose, by notice, a limitation at which a book shall be sold at retail by future purchasers, with whom there is no privity of contract." *Bobbs-Merrill Co. v. Straus* (decided by the Supreme Court, June 1, 1908) 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086. This distinction has been drawn since the decision of the cases we refer to, and since the decision of the *Hartman case* above referred to. There are decisions by most respectable courts which hold that articles, such as proprietary medicines, are outside of all rules and statutes which forbid contracts in restraint of trade, because they are made under a secret formula. Some, if not most, of these decisions have been made in cases in which the Dr. Miles Medical Company has been a party. They are cited and commented [806] upon by this court in the case of *Jno. D. Park*

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*& Sons v. Hartman*, 153 Fed. 24, 34, 82 C. C. A. 158, 12 L. R. A. (N. S.) 1135. They go upon the conceded fact that a trade secret or medical formula is a monopoly until discovered by fair means, and will be protected against abuse by one who learns it under a contract limiting its use or in the confidence of an employment. They do not observe any distinction between the necessary monopoly of the secret itself and the unnecessary monopoly of the articles made according to the secret process and offered for sale and resale to the consuming public. Neither do those decisions recognize any distinction between the statutory monopoly accorded to articles protected by a patent or copyright and those made under such private formulas. The argument in support of this result is epitomized in all the cases referred to, but may be seen in full in the opinion of Colt, C. J., in the case styled "*Dr. Miles Medical Co. v. Jaynes Drug Co.*" (C. C.) 149 Fed. 838. The same argument was presented by the counsel now representing the Dr. Miles Medical Company in the case decided by this court of *Jno. D. Park & Sons Co. v. Hartman*, 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 1135, and again presented with elaboration in the present case. In the case referred to, we reached with unanimity the conclusion that no legal, economic, or moral reason existed for regarding contracts in respect to the vast and ever-increasing commerce in proprietary medicines as either outside of the mischief intended to be remedied by the federal statute against monopolies or the rules of the common law, or within the statutory protection afforded by the patent and copyright statutes. Any other conclusion would be to sanction a monopoly in that class of goods vastly more far-reaching than the monopoly extended upon high grounds of public policy to the inventor. The statutory monopoly has a limitation of a few years. To obtain it the inventor must put on record his invention. At the end of the term the public will be free to employ the discovery without the burden theretofore imposed as a compensation to the inventor. Not so with the monopoly asked for by those who control the enormous proprietary trade of this country. Their monopoly will go on forever, and, if there be merit in their

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formula, they may not only preserve it through all time, but continue to restrain prices and prevent competition in the sale of the product. It is said that the proprietor of such a secret remedy need never communicate his formula. Concede this. To say that he need never compound his medicine, and that, if he does, he need not sell it unless he chooses, is undoubtedly true. But as much may be said about any article which the producer may choose to make or not to make, sell or not sell, as he wills. So much pertains inherently to the natural freedom of man in respect to his own actions. But if he elects to make and sell a product according to his formula, a public interest is affected if he be permitted to restrain freedom of trade in the article when it has once passed under the dominion of a buyer. A free right of alienation is an incident to the general right of property in articles which pass from hand to hand in the commerce of the world. Coke on Littleton, § 360. The mere fact that one article or class of articles is made under an unknown and private formula and another class is not is an undeniable fact which may serve for some purposes to differentiate them. But [807] that single fact does not afford an economic reason, and still less a legal reason, for saying that it operates to exempt such articles from rules against unlawful restraints of trade.

We need not repeat the argument by which we reached the conclusion that the system of contracts which Hartman sought to enforce through the injunctive power of a court of equity was obnoxious not only to the statute of Congress against restraints and monopolies in respect of interstate trade but inimical also to the reasonable restraints which at common law may be imposed as ancillary to a principal contract. All that we said in respect to the Hartman system is applicable here. The case falls directly within the reasoning and decision of that case in respect to every aspect of the question, and the decree sustaining the demurrer interposed by the appellees must be affirmed.

"Consignment Contract. Wholesale. The Dr. Miles Medical Company.

"This agreement made by and between the Dr. Miles Medical Company, a corporation, of Elkhart, Indiana, hereinafter referred to

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as the proprietor and ————— hereinafter referred to as the consignee, witnesseth:

"That the said proprietor hereby appoints said consignee one of its wholesale distributing agents, and agrees to consign to such consignee for sale for the account of said proprietor such goods of its manufacture as the proprietor may deem necessary, the title thereto and property therein to be and remain in the proprietor absolutely until sold under and in accordance with the provisions hereof, and all unsold goods to be immediately returned to said proprietor on demand and the cancellation of this agreement. Said goods to be invoiced to consignee at the following prices:

"Medicines, of which the retail price is \$1.00; \$3.00 per dozen.

"Medicines (if any) of which the retail price is 50 cents; \$4.00 per dozen.

"Medicines, of which the retail price is 25 cents; \$2.00 per dozen.

"Freight on all orders, the invoice price of which amounts to \$100.00 or more, to be prepaid by the proprietor; otherwise, freight to be paid by consignee.

"Said consignee agrees to confine the sale of all goods and products of the said proprietor strictly to and to sell only to the designated retail agents of said proprietor as specified in lists of such retail agents furnished by said proprietor and alterable at the will of said proprietor, and to faithfully and promptly account and pay to the proprietor the proceeds of all sales, after deducting as full compensation for all services, charges and disbursements a commission of ten per cent of the invoice value, and a further commission of five per cent on the net amount of each consignment, after deducting the said ten per cent commission, on all advances on account remitted within ten days from date of any consignment, it being agreed between the parties hereto that such advances shall in no manner affect the title to such goods, which title shall remain in the proprietor as if no such advances had been made; provided that such advances shall be repaid to said consignee should the said proprietor terminate this agreement and the return of any unsold goods on which advances have been made. Said consignee guarantees the payment for all goods sold under this agreement and agrees to render a full account and remit the net proceeds on the first day of each month of and for the sales of the month preceding. Failure to make such accounting and remittance within ten days from the first of each month shall render the whole account payable and subject to draft, but the proceeds of such draft shall not affect the title of any unsold goods which shall remain in the proprietor until actually sold, as herein provided.

"It is further agreed that the consignee shall furnish the proprietor from time to time upon demand full statements of the stock of goods of the proprietor on hand on any date specified and that a failure to furnish such statements within ten days from date of such demand

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shall be a sufficient cause for the cancellation of this agreement, and a demand for the return of the consigned goods.

[808] "It is further agreed that the proprietor will cause each retail package of its goods to be identified by a number and said consignee hereby agrees to furnish the said proprietor full reports upon proper cards or blanks furnished by said proprietor of the disposition of each dozen or fraction of such goods by means of the identifying numbers, specifying the names and addresses of the retail agents to whom such goods have been delivered and the dates of such delivery, and to send such reports to said proprietor at least semi-monthly, and at any other time on the request of said proprietor.

"It is understood and agreed between the parties hereto that the commissions herein specified shall not be considered as earned by said consignee upon any goods of said proprietor which shall have been delivered to dealers not authorized agents of said proprietor, as per list of such agents, or upon any goods whose disposition by said consignee shall not have been properly reported as herein provided, or sold at prices less than the prices authorized, and that said consignee shall not credit any such commissions when making remittances on consignment account provided notice has been given by said proprietor that such commissions are unearned; and that if such unearned commissions have been deducted by said consignee in making advance payments or monthly remittances on account they shall be charged back to said consignee and credited and paid to said proprietor. It is understood that violation or non-observance of any provision hereof by the consignee shall make this agreement terminable and all unsold goods returnable at the option of the proprietor.

"It is agreed that the goods of said proprietor shall be sold by said consignee only to the said retail or wholesale agents of said proprietor, as per list furnished, at not less than the following prices, to-wit:

"Medicines, of which the retail price is \$1.00; \$8.00 per dozen.

"Medicines (if any), of which the retail price is 50 cents; \$4.00 per dozen.

"Medicines, of which the retail price is 25 cents; \$2.00 per dozen.

"Provided, that said consignee may allow a cash discount not exceeding one per cent, if paid within ten days from date of invoice, and that when sales at one time and at one invoice, amount to \$15.00 or more, the said consignee may allow three per cent trade discount, and if said purchase amounts to \$50.00 or more, five per cent trade discount, all without cost to the proprietor, and if such \$50.00 quantity shall be shipped direct to the retail purchaser from the laboratory of the said proprietor, on the order from the said wholesale distributing agent, freight will be prepaid by the proprietor, but not otherwise.

"This contract will take effect when the original, duly signed by the consignee, has been received and accepted by the Dr. Miles Medical Company, at Elkhart, Indiana.



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"Done under our hands \_\_\_\_\_ A. D., 1907.

(Fill in date on above line.)

"The Dr. Miles Medical Company.

"\_\_\_\_\_

"Wholesale dealer. Sign your name on above line. Original return in enclosed envelope."

"Retail Agency Contract.

"The Dr. Miles Medical Company.

"This agreement between the Dr. Miles Medical Company of Elkhart, Indiana, and \_\_\_\_\_ of \_\_\_\_\_, Retailers named on above line, \_\_\_\_\_ Town, \_\_\_\_\_ State, hereinafter referred to as the retail agent, witnesseth:

"Appointed Agent.

"The said Dr. Miles Medical Company hereby appoints said retail dealer as one of the retail distributing agents of its proprietary medicines and agrees that said retail agent may purchase the proprietary medicines manufactured by said Dr. Miles Medical Company (each retail package of which the said company will cause to be identified by a number) at the following prices, to-wit:

[809] "Wholesale Prices.

"Medicines, of which the retail price is \$1.00; \$8.00 per dozen.

"Medicines, of which the retail price is 50 cents; \$4.00 per dozen.

"Medicines, of which the retail price is 25 cents; \$2.00 per dozen.

"Quantity Discounts.

"Provided that when purchases at one time and on one invoice amount to \$15.00 (or more), wholesale distributing agents are authorized to allow three per cent trade discount; if such purchase amounts to \$50.00 (or more) five per cent trade discount will be allowed, and if such \$50.00 quantity be shipped direct to the purchaser from the laboratory of said Dr. Miles Medical Company for the account at such wholesale agent, freight will be prepaid, but not otherwise.

"Full price.

"In consideration whereof said retail agent agrees in no case to sell or furnish the said proprietary medicines to any person, firm or corporation whatsoever, at less than the full retail price as printed on the packages, without reduction for quantity; and said retail agent further agrees not to sell the said proprietary medicines at any price to wholesale or retail dealers not accredited agents of the Dr. Miles Medical Company.

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## " Violation.

" It is further agreed between the parties hereto that the giving of any article of value, or the making of any concession by means of trading stamps, cash register coupons, or otherwise, for the purpose of reducing the price above agreed upon shall be considered a violation of this agreement, and further it is agreed between the parties hereto that the Dr. Miles Medical Company will sustain damage in the sum of twenty-five dollars (\$25.00) for each violation of any provision of this agreement, it being otherwise impossible to fix the measure of damage.

" This contract will take effect when a duplicate thereof, duly signed by the retail agent, has been received and approved by the Dr. Miles Medical Company, at its office at Elkhart, Indiana.

" Done under our hands \_\_\_\_\_, A. D. 1907.

(Fill in date on above line.)

" The Dr. Miles Medical Company.

" \_\_\_\_\_

" Retail dealer, sign your name on above line in ink.

" To retail dealer:

" Paste printed label, giving name and address, that your name may be correctly listed.

" Duplicate. Keep for reference."

[227] CONTINENTAL WALL PAPER COMPANY v.  
LOUIS VOIGHT & SONS COMPANY.\*

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SIXTH CIRCUIT.

No. 15. Argued April 24, 27, 1908.—Decided February 1, 1909.

[212 U. S. 227.]

Where a number of manufacturers situated in different States engaged in manufacturing an article sold in different States, organize a selling company through which their entire output is sold, in accordance with an agreement between themselves, to persons only as enter into a purchasing agreement by which their sales are restricted, the effect [228] is to restrain and monopolize interstate and foreign trade and commerce and is illegal under the Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209; and so held in regard to a combination of wall paper manufacturera.<sup>b</sup>

\* For opinion of Circuit Court of Appeals, Sixth Circuit (148 Fed. Rep. 939) see, *ante*, p. 44.

<sup>b</sup> Syllabus copyrighted, 1909, by The Banks Law Publishing Company.

**Syllabus.**

While a voluntary purchaser of goods at stipulated prices under a collateral, independent contract cannot avoid payment merely on the ground that the vendor was an illegal combination, *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, a vendee of goods purchased from an illegal agreement can plead such illegality as a defense.

The court can not lend its aid in any way to a party seeking to realize the fruits of an illegal contract, and, while this may at times result in relieving a purchaser from paying for what he has had, public policy demands that the court deny its aid to carry out illegal contracts without regard to individual interests, or knowledge of the parties.

The refusal of judicial aid to enforce illegal contracts tends to reduce such transactions.

In determining whether a contract amounts to a combination in restraint of interstate trade in violation of the act of July 2, 1890, all the facts and circumstances will be considered. *Addyston Pipe Co. v. United States*, 175 U. S. 211, 247.

148 Fed. Rep. 939, affirmed.

[53 L. ed. 486.] \*

1. A recovery upon an account for goods sold and delivered by a corporation created to effectuate a combination of wall paper manufacturers, intending and having the effect directly to restrain and monopolize trade and commerce, in violation of the Anti-Trust Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), can not be had where the account is made up, within the knowledge of both buyer and seller, with direct reference to, and in execution of, the agreements which constitute the illegal combination.<sup>a</sup>
2. Defendants in an action for goods sold and delivered are entitled to judgment on a demurrer admitting the allegations of a defense set up by way of answer, which in substance disclose that plaintiff is the selling agent of a combination of wall paper manufacturers which offends against the Anti-Trust Act of July 2, 1890, that, in carrying out such combination, defendants were virtually compelled to sign a jobber's agreement which, in effect, bound them to buy from the plaintiff all the wall paper needed in their business at certain fixed prices, and not to sell at lower prices or upon better terms than those at which plaintiff itself sells to dealers other than jobbers, that the goods in question were ordered pursuant to such agreement and at the prices fixed, that such prices were unreasonable, and that all the transactions between the parties were in furtherance of the illegal combination.<sup>a</sup>

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## Argument for the Petitioner.

The facts appear in the statement of Mr. Justice Harlan. *Mr. Louis Marshall*, with whom *Mr. Joseph Wilby* was on the brief, for petitioner.

Assuming, but not conceding, that the organization of the plaintiff was for the purpose of restraining competition, and enhancing prices, the defendants have no defense, under common-law considerations, to the action brought against them to recover for goods sold and delivered.

The illegality of the acts of plaintiff, even if proved, do not absolve the defendants from the legal obligation to pay for goods admittedly bought by them. "A person does not become an outlaw and lose all rights by doing an illegal act." *National Bank & Loan Co. v. Petrie*, 189 U. S. 425.

This case is governed by the decision of this court in the case of *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, and [229] cases there cited. See also, to the same effect, the following: *Edison Electric Light Co. v. Sawyer-Man Electric Co.*, 53 Fed. Rep. 598; *American Soda Fountain Co. v. Green*, 69 Fed. Rep. 333; *Brown Saddle Co. v. Troxel*, 98 Fed. Rep. 620; *National Folding Box and Paper Co. v. Robertson*, 99 Fed. Rep. 985; *Otis Elevator Co. v. Geiger*, 107 Fed. Rep. 131; *Ocean Ins. Co. v. Polleys*, 13 Peters, 164; *Armstrong v. American Exchange Bank*, 133 U. S. 467; *Buchanan v. Drivers' National Bank*, 55 Fed. Rep. 226; *Morris v. Norton*, 75 Fed. Rep. 926; *Phalen v. Clark*, 19 Connecticut, 432; *The Charles E. Wisewell*, 86 Fed. Rep. 674; *Phenix Ins. Co. v. Clay*, 101 Georgia, 332; *Erb v. Insurance Co.*, 98 Iowa, 611; *Niagara Ins. Co. v. DeGraff*, 12 Michigan, 136; *Tracy v. Talmage*, 14 N. Y. 175; *Curtis v. Leavitt*, 15 N. Y. 245; *Mandelbaum v. Greyovich*, 17 Nevada, 95; *Planters' Bank v. Union Bank*, 16 Wall. 500; *Yarborough's Admr. v. Avant*, 66 Alabama, 526; *Ware v. Curry*, 67 Alabama, 274; *Martin v. Hodge*, 47 Arkansas, 378; *National Distilling Co. v. Cream City Importing Co.*, 86 Wisconsin, 352; *Minnesota Lumber Co. v. Whitebreast Co.*, 56 Ill. App. 248; *Congress Co. v. Knowlton*, 103 U. S. 49; *Welch v. Wasson*, 6 Gray, 506; *Levin v. Chicago Gas Light*

## Argument for the Petitioner.

& Coke Co., 64 Ill. App. 393; *Ingraham v. National Salt Co.*, 130 Fed. Rep. 676.

Again, assuming that the plaintiff was a trust, and that it could have been lawfully proceeded against, under the act of Congress of July 2, 1890, yet that fact does not prevent the plaintiff from recovering for the goods which it sold and delivered to the defendants.

While the statute declares a trust, or combination, such as the plaintiff is claimed to be, illegal, and subjects every person entering into the combination to fine and imprisonment, and makes adequate provision for its annulment, yet there is nothing in the act, which permits one who purchases goods from such a trust, to despoil it of its property. The Government of the United States is sufficiently powerful to cope with an unlawful monopoly, without legalizing robbery of the character which the defendants are seeking to perpetrate, through the aid of the courts. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540; *The Charles E. Wisewall*, 74 Fed. Rep. 802, affirmed, 86 Fed. Rep. 671; *Dickerman v. Northern Trust Co.*, 176 U. S. 195; *Lafayette Bridge Co. v. City of Streator*, 105 Fed. Rep. 229; *Cincinnati Packet Co. v. Bay*, 200 U. S. 179, 185.

Even assuming, that the clause contained in the contract between the plaintiff and the defendants, which prohibited the latter from selling any of the merchandise purchased from the former, at lower prices than those specified in the schedule annexed, was illegal, the only effect of such illegality would be, to nullify that provision, and not to prevent the plaintiff from recovering for merchandise actually received and kept by the defendants. *Pigot's case*, 11 Coke Rep. 27b (1615), holding that if some conditions indorsed on a bond, are against law, and some are good and lawful, the covenants or conditions which are against law, are void *ab initio*, and the others stand good. And see *Hammon on Contracts*, 251 et seq.; *Anson on Contracts* (8th ed.), 206; *Pickering v. Ilfracombe Ry. Co.*, L. R. 3 C. P. 235, 250; *United States v. Bradley*, 10 Pet. 343; *Hynds v. Hays*, 25 Indiana, 31; *Kerrison v. Cole*, 8 East, 231; *Gelpcke v. City*

## Argument for the Respondent.

of *Dubuque*, 1 Wall. 221; *Gaskell v. King*, 11 East, 165; *Erie Ry. Co. v. Union Locomotive & Exp. Co.*, 35 N. J. L. 240; *Baines v. Gearey*, 35 Ch. Div. 154; *Wallis v. Day*, 2 Mees. & W. 273; *Haynes v. Doman*, L. R. (1899) 2 Ch. 13; *Oregon Navigation Co. v. Winsor*, 20 Wall. 64; *Western U. T. Co. v. Burlington & S. W. Ry. Co.*, 11 Fed. Rep. 1; *Presbury v. Fisher*, 18 Missouri, 50; *Moore v. Bonnet*, 40 California, 251; *Hanauer v. Gray*, 25 Arkansas, 350; *Price v. Green*, 16 Mees. & W. 346; *Wiley v. Baumgardner*, 97 Indiana, 66; *Dean v. Emerson*, 102 Massachusetts, 480; *Peltz v. Eichele*, 62 Missouri, 171; *United States v. Bradley*, 10 Pet. 343, 360, 364; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507; S. C. 46 L. R. A. 255; *Thomas v. Miles*, 3 Ohio St. 274; *Smith's Appeal*, 113 Pa. St. 579.

The principle of these cases is directly in point here. The plaintiff agreed to sell to the defendants certain merchandise [231] at an agreed price. The latter agreed to pay for the merchandise received the stipulated price, and also agreed that they would not sell such merchandise at a lesser price than that specified in the contract.

Assuming that the latter condition is void, in that event it was not binding upon the defendants; but, as has been seen, such invalidity would not absolve the defendants from liability on their covenant to pay for the merchandise delivered.

*Mr. Orris P. Cobb* and *Mr. Morrison R. Waite* for respondent.

Treating the matter, as it must be treated, as one general scheme, all one agreement, it plainly comes within the common-law inhibition against contracts in restraint of trade, as well as the statutes. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211; *Swift & Co. v. United States*, 196 U. S. 375, 396; *Montague v. Lowry*, 193 U. S. 38, 45; *Loewe v. Lawlor*, 208 U. S. 274.

The combination was an illegal trust, and an unlawful combination within the meaning of the statutes. *United States v. Trans-Missouri Assn.*, 166 U. S. 290; *United States v. Joint Traffic Assn.*, 171 U. S. 505; *Montague v. Lowry*,

## Argument for the Respondent.

193 U. S. 38; *Northern Securities Co. v. United States*, 193 U. S. 197; *Swift & Co. v. United States*, 196 U. S. 375; *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 129; *United States v. Jellico C. & C. Co.*, 46 Fed. Rep. 432; *American Biscuit Co. v. Klotz*, 44 Fed. Rep. 721; *Oliver v. Gilmore*, 52 Fed. Rep. 562; *C., M. & St. P. R. Co. v. Wabash, &c., R. R. Co.*, 61 Fed. Rep. 993, 997; *National Harrow Co. v. Hench*, 83 Fed. Rep. 36, 38; S. C. 84 Fed. Rep. 226; *United States v. Coal Dealers' Assn.*, 85 Fed. Rep. 252; *Cravens v. Carter-Crume Co.*, 92 Fed. Rep. 479, 485; *Lowry v. Tile & G. Assn.*, 98 Fed. Rep. 817, 826; S. C. 106 Fed. Rep. 38; *Montague v. Lowry*, 115 Fed. Rep. 27; *United States v. C. & O. Fuel Co.*, 105 Fed. Rep. 98; *C. & O. Fuel Co. v. United States*, 115 Fed. Rep. 610; *City of Atlanta v. Chattanooga, F. & P. Co.*, 101 Fed. Rep. 900.

The contract between the plaintiff and defendant, under which [232] arises the account sued on, is a part of and directly connected with the illegal combination, and hence, unenforceable, and not merely a collateral or independent contract.

It is clear that this is not a mere case of a sale by a monopoly or a trust to a third person and that the objection raised by the defendant is not the same as that which would be raised by an outsider purchasing from a trust. *Connolly v. Union Sewer Pipe Company*, 184 U. S. 540, distinguished.

The fact that the consideration has all been executed on one side can not alter the matter. There can be no recovery for goods sold and delivered under trust contracts, or any other contract creating an illegal monopoly in restraint of trade. See *Detroit Salt Co. v. National Salt Co.*, 134 Michigan, 108; *Arnot v. Pittston & Elmira Coal Co.*, 68 N. Y. 558; *Unckles v. Colgate*, 148 N. Y. 529, 538; *Clancy v. Onondaga Fine Salt Mfg. Co.*, 62 Barb. 395, 405-407; *Houck v. Brew. Assn.*, 88 Texas, 184; *Fuqua v. Pabst Brew. Co.*, 90 Texas, 298; *Texas Brew. Co. v. Templeman*, 90 Texas, 277; *Carriage Co. v. Hatch*, 19 Tex. Civ. App. 120.

All the statutes relied on in this case expressly forbid the making of the contracts of which the one between the plaintiff and defendant, set out in the third defense, was a material step; expressly declare the contracts void; and ex-

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pressly impose a penalty upon the making of them and expressly make them criminal.

Under these statutes such transactions and such contracts are just as illegal as gambling; as contracts to assist in the smuggling of goods; as contracts to deal in futures; as contracts to make and circulate counterfeit money; as the sale of liquor in violation of law; as contracts to assist in prostitution; or in any other way to violate criminal statutes, or in furtherance of such objects.

The cases in which recovery has been denied either of the contract price when suing on the contract or on the common counts ignoring the contract, are numerous. *Ribbons v. Crickett*, 1 B. & P. 264, 266; *Bensley v. Bignold*, 5 B. & Ald. [233] 335; *Marchant v. Evans*, 2 J. B. Moore, 14; *Gibbs v. Gas Co.*, 130 U. S. 396, 412; *Irwin v. Williar*, 110 U. S. 499; *McMullen v. Hoffman*, 174 U. S. 639; *Embry v. Jemison*, 131 U. S. 336, 348; *Miller v. Ammon*, 145 U. S. 421, 427; *Hanauer v. Doane*, 12 Wall. 342; *Sprott v. United States*, 20 Wall. 459; *Kohn v. Melcher*, 43 Fed. Rep. 641; *Peck v. Burr*, 10 N. Y. 294, 297; *Johnston v. Dahlgren*, 166 N. Y. 355, 258; *Brinkman v. Eisler*, 40 N. Y. 865, 866.

These cases show that wherever and in whatever form the question has arisen, whether for goods sold and delivered, for money loaned, services rendered, there can be no recovery on an implied contract where the express contract is illegal and the goods sold, the money loaned, or the services performed under and in pursuance of and in furtherance of an illegal contract.

Mr. Justice HARLAN made the following statement of facts.

The Continental Wall Paper Company, a corporation of New York, brought this action against The Lewis Voight & Sons Company, a corporation of Ohio, to recover the sum of \$56,762.10, as the alleged balance on an account for merchandise sold and delivered to the defendant.

The petition and answer were both amended. The amended answer contained six separate defenses, the last three of which were made counterclaims and cross-petitions. The plaintiff demurred to the second, third, fourth and fifth




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defenses upon the ground that neither of them stated facts sufficient to constitute a defense; and it demurred to the first and second counterclaims and cross-petitions upon the ground that they did not state facts sufficient to constitute a cause of action against the plaintiff. It also replied to the sixth defense and to the third counterclaim.

The cause was submitted in the Circuit Court on the demurrers, and the court sustained the demurrer to the second, fourth and fifth defenses and to the first and second counter[234]claims and cross-petitions, but overruled the demurrer to the third defense. The parties not desiring to plead further, it was adjudged that upon the allegations of the third defense the defendant was entitled to judgment (and judgment was entered) dismissing the petition and amended petition; and was likewise entitled to judgment (and judgment was entered) dismissing the first and second counterclaims and cross-petitions. The case was carried by the Continental Wall Paper Company to the Circuit Court of Appeals, where it was assigned for error that the Circuit Court erred in overruling the demurrer to the third defense, and in dismissing the suit. The Circuit Court of Appeals affirmed the judgment, thereby sustaining the sufficiency of that defense. The case is fully reported in 148 Fed. Rep. 939.

If the facts stated in the third defense—taking them to be true, as upon demurrer we must do—are sufficient to prevent any recovery whatever, by the plaintiff, it is not necessary to go further and consider any other questions. In view of the peculiar character of the case it is deemed just to the parties, however much it may lengthen or burden this opinion to do so, to set out that defense fully and in the words of the answer.

The third defense—the facts stated therein being admitted by the demurrer—gives the names of numerous companies and firms (more than thirty in number) which formed a combination by the name of the Continental Wall Paper Company, and also sets out the various agreements under which, it was alleged, the combination was organized to restrain and monopolize interstate commerce. The defendant corporation alleged that on the first day of July, 1898, the National Wall Paper Company was the owner of factories



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for the manufacture of wall paper in certain cities in New York, Pennsylvania, New Jersey and Massachusetts, and that there were like factories owned by persons and corporations in other States; that "all of said companies and firms were engaged in the manufacture of wall paper and in selling their product in the States where their said manufactories were situated, and in all the [285] other States and Territories of the United States and in foreign countries, and were each and all engaged in commerce between the States and Territories and with foreign nations, and they produced and sold upwards of ninety-eight (98) per cent of all the wall paper manufactured and sold in the several States and Territories of the United States. Contriving and intending and conspiring with each other to form a combination and trust by which to limit the production of wall paper in the United States and also to enhance the price thereof to the jobbers, the wholesalers, the retailers and the consumers of wall paper, which is an article of commodity of general necessity and use among the United States and foreign countries, and, as such, was and is used and sold everywhere for the preservation, protection, and decoration of buildings and dwelling houses; and, contriving and intending and conspiring with each other to unlawfully control and restrain trade and commerce between the several States and Territories of the United States, and with foreign countries, the firms and corporations hereinbefore mentioned, agreed with each other that while said corporations and persons retain the ownership of their several plants and business, and preserve and continue their separate identities and operate said several manufactories and business as before, the control of said several businesses, and all matters relating to and affecting the production of said establishments and the prices and sale of wall paper manufactured thereby, should be placed under the control of a committee to be appointed by said several corporations and firms, each to have a voice in such appointment, in proportion to the capacity of the several factories owned by them respectively; that said committee should adopt rules and regulations governing the manner of conducting the business of all said persons, firms, and corporations, the hours said factories, owned by

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them, should be operated, the patterns of wall paper to be manufactured by them, the times when samples of the goods to be manufactured for the ensuing season should be submitted to a pricing committee, appointed by said committee, to enable it to classify and [236] fix the list prices thereof; to fix and determine list prices, discounts, terms of sale, equalization of freight rates and all other matters affecting the production and regulation of prices, and the classification of the dealers in wall paper in the United States; and the prices at which wall paper should be sold to, and by such several classes; and the division of the profits, thence arising among said corporations and firms, not in proportion to their production and sales, but in proportion to their capacity; and, further, that, to secure the faithful performance by each of said persons and corporations of the provisions of said trust agreement, they should each pay a sum into a common pool, in proportion to the capacity of their respective manufacturing, which said sum should be forfeited by any of said manufacturers who should break said agreement, compete with the other parties to said agreement, or sell at other or different prices than those to be fixed by said committee.

\* \* \* \* \*

The National Wall Paper Company, for itself and the members of said combination, hereinbefore alleged to be represented by it, should select three (3) so-called directors of said The Continental Wall Paper Company, and said other firms and corporations should select three (3) other so-called directors of said company, which six (6) so-called directors should select a seventh (7th), who should decide all disputed matters; that said corporation and firms, calling itself, or themselves, respectively, the vendor, should sign a printed contract or agreement with said The Continental Wall Paper Company, calling itself the company, a copy of which contract or agreement is attached hereto marked "Exhibit 1," [which is given in the margin<sup>a</sup>] the said agreement

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<sup>a</sup> EXHIBIT 1.

An agreement, made this — day of ——— in the year one thousand eight hundred and ninety-eight, by and between ——— a corporation organized under the laws of the State of ——— (hereinafter

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being printed with blanks for [237] the necessary signatures as well as numbers of shares allotted, the sum to be paid therefor and the name of the so-called vendor.

[238] For the purposes and with the intentions aforesaid, it was further agreed that said The Continental Wall Paper Company should, in some form so as to disguise the real nature of the transaction, compel all dealers in wall paper, whether [239] jobbers or wholesalers, to sign an agreement

called the vendor), party of the first part, and the Continental Wall Paper Company, organized under the laws of the State of New York (hereinafter called the company), party of the second part.

Whereas, the vendor is engaged in the manufacture and sale of wall paper, borders and other articles usually produced and handled in connection therewith, and the company is desirous of action as its selling agent in handling the entire product of the vendor; and

Whereas, the company has an authorized capital of two hundred thousand dollars, divided into 16,000 shares, of the par value of \$12.50 each; and

Whereas, the vendor is desirous of acquiring shares of the stock of said company at par, and to that end has offered to enter into this agreement and to secure the performance thereof by the deposit of said shares.

Now, therefore, in consideration of the foregoing recitals, and for other good and valuable considerations it is agreed, between the parties hereto, as follows:

First. The vendor hereby agrees to sell unto the company and the latter agrees to purchase, the entire product of wall paper that may be manufactured by the vendor for the period from July 20th, 1898, to the first day of July, 1899.

The prices at which the merchandise shall be sold to the company are set forth in a schedule hereto annexed, marked "A" and hereby made part of this agreement.

The vendor further grants unto the company the right to two renewals of said contract of one year each, provided that in the event of the election of the company to avail itself of either of said renewals it shall so signify in writing to the vendor before the first day of June next preceding the renewal term, and provided further that such election to renew shall be accompanied by the written consents of all the registered stockholders of the company, including that of the vendor.

Second. That the goods acquired by the company from the vendor hereunder which are to be sold to jobbers, shall be so sold by the company, and not by the vendor, for the account of the company. Such sale shall be made by the company at discounts from road prices fixed in the schedule hereto annexed, marked "B," which is hereby made

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obligating the jobbers or wholesalers to buy from no one but said members of said combination and trust, and at the prices fixed in schedule B, attached to said "Exhibit 1," and likewise an agreement [240] by such jobbers, not to sell goods to dealers other than jobbers, at lower prices or upon better or more favorable terms than those shown in schedule C, attached to said "Exhibit 1," under the penalty that, if they refused so to do, no wall paper should [241] be sold to such

part of this agreement. The vendor will deliver such goods upon the direction of the company, at the risk and for the account of the latter f. o. b. at the place of manufacture, provided, however, that in all cases in which the goods are manufactured at places other than the cities of New York or Philadelphia the vendor will equalize the freights with either of said cities out of the proceeds receivable for such goods. Memorandum invoices shall be supplied to the customers and to the company immediately upon the shipment and delivery of such goods, said invoices specifying quantities and road prices.

Third. There shall be furnished by the vendor to the company, on the 7th, 14th, 21st and last days of each month, (except when those days fall on Sundays, and then on the next preceding day), a just and true statement of all shipments and deliveries of merchandise included in this contract which the vendor may make for the account of the company, which statement shall contain the names of the purchasers, the character of the goods sold and the prices at which they are sold, to the end that the company may make the proper charges, and in order to entitle the vendor to be credited with the agreed cost price for such goods.

Each of such statements of shipment shall be accompanied by an affidavit of one of the officers of the vendor and one of its bookkeepers and one of its shipping clerks, to the effect that the information contained therein is true.

Fourth. The vendor will, at the option of the company, sell for the latter such of the goods manufactured by the vendor as are to be disposed of to purchasers not classified as jobbers, which sales shall be made at the cost and expense of the vendor, said vendor hereby guaranteeing all credits connected with such sales. The prices at which and the terms upon which such goods are to be sold are designated in this agreement as the "road prices," and are contained in a schedule hereto annexed, marked "C," which is hereby made a part of this agreement.

On the 7th, 14th, 21st and last days of each month (except when those days fall on Sundays, and then on the next succeeding days) the vendor will furnish to the company a statement showing all the shipments made on account of such sales which statement shall contain the names of the purchasers, the character of the goods and the

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jobber by any of said corporations or firms, and that, thereby, such jobbers should be driven out of business; and that, in some form or other, so as to disguise the real nature of the transaction, all wholesalers other than jobbers should be compelled to make an agreement in writing, with said corporations or firms, not to sell such goods on terms better or more favorable than those specified in schedule C, attached to said "Exhibit 1," under penalty that if such wholesaler refuse to sign and carry

prices at which they were sold, and such sales shall be credited to the vendor by the company at the prices fixed in schedule "A," and shall be charged against said vendor at the prices at which they were sold, which shall in no event be less than those designated in schedule "C."

The vendor is to receive for its services and expenses connected with such sales and allowances discounts equal to those who are designated in a classification made by the parties hereto as "second class jobbers," less the discounts made on sales to purchasers designated in the accompanying schedules as "quantity purchasers" on which the vendor has allowed the quantity discount, except that where special and exclusive goods are sold there shall be an allowance of 30 per cent discount to the vendor.

The prices of goods as fixed by schedule "A" and "C" may be altered from time to time, but the discounts allowed to jobbers shall not be altered at any time during the term of this agreement.

Fifth. The vendor will make collections of all accounts for goods sold by it for the accounts of the company under the provisions of the agreement, except for sales to jobbers (which accounts the company is to collect,) and will, on the 10th of each and every month during the term of this agreement, account to the company. Such accounts shall be accompanied by a payment by the vendor to the company of the difference between the prices at which the goods are agreed to be sold to the company as embodied in schedule "A," and the prices at which the vendor has agreed to dispose of said goods as contained in schedule "C."

The purchases made by the company from the vendor hereunder shall be upon the same credit and terms as those accorded to other dealers, but the company shall have the right to anticipate the due date of all such purchases, and will pay, on the 10th day of each month, to the vendor a sum on account of all shipments of the preceding month equal to not less than 30 per cent of the road prices of goods shipped to the jobbers by the company.

Sixth. The vendor hereby grants unto the company the right, and it shall be the duty of the latter, through its officers selected for that purpose, to audit the books of accounts of the vendor at such times and in such manner as the company may, from time to time, deem necessary or proper. This provision is of the essence of the agree-

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out said agreement, no wall paper would be sold to him by any of said corporations or firms, and he should be driven out of business, and that the profits made by such prevention of competition and enhancement of price should be divided among said corporations and firms nominally as dividends upon said stock, but in reality, in proportion to their respective holdings as aforesaid, and that said committee of said corporations and said firms, calling themselves such directors,

ment, and a failure on the part of the vendor to faithfully perform the same shall operate as a breach of the contract entitling the company to abrogate the agreement and to such damages as it may be able to establish in addition to the absolute transfer and surrender to it of the stock to be pledged as hereinafter provided.

Seventh. There shall be a committee selected from the company to be known as an auditing committee, which shall be made up from among the directors. Said committee shall have power to establish such a system of bookkeeping as in its judgment may be advisable.

In order to conform as nearly as may be to the laws of the various States in which the factories of the vendor are located, it is understood that the vendor shall not be at liberty to require from the company the acceptance of the product of more than ten hours per day of any one of said factories.

The product intended to be sold to the company hereunder and which the latter undertakes to acquire, does not contemplate the enlargement of the manufacturing facilities of the vendor, but nothing herein contained shall be construed as affecting the right of the vendor to substitute new machinery of the same capacity for any now in use which may become useless through wear or through destruction by fire or other casualty.

The power to designate the parties who are to be classed as jobbers and the discounts to which they are entitled is expressly reserved by the company, and such designation is to be made through its board of directors, but the vendor shall have the right to select the jobbers through whom the goods manufactured by it are to be distributed.

All orders placed with the vendor by jobbers on behalf of the company must at once be reported to the latter.

Eighth. The company hereby agrees to sell and the vendor agrees to purchase ——— shares of the common stock of the company, for which stock the vendor agrees to pay the sum of ——— in cash as soon after the execution and delivery of this agreement as the same may be demanded by the company, but only if and when the entire share capital of the company shall have been fully subscribed at not less than par.

The vendor will, after paying for said shares of stock, endorse the certificates representing the same, and deliver the certificates so

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should regulate all the matters hereinbefore averred, prevent competition between said corporations and firms, limit production and enhance prices, and close all channels by which the consumer or retailer could obtain wall paper from the producers thereof.

In pursuance of said agreement, said plaintiff was nominally incorporated with the stock aforesaid, divided into the [242] number of shares aforesaid, of the par value aforesaid, which were divided among the parties to said agreement aforesaid, in the manner aforesaid, and said contracts signed by said The National Wall Paper Company, and said persons and corporations, being, at once, subscription for stock by said so-called vendors, the acceptance of such subscription by said The Continental Wall Paper Company, and by it, nominally, each so-called vendor sold unto the company, and the latter agreed to purchase, the entire product of wall paper manufactured by each of said vendors for the period from July 20th, A. D. 1898, to the first day of July, A. D. 1899.

Said contract further fixed prices at which the merchandise should be nominally sold to the company, said prices

endorsed in blank unto the company, upon the trust and agreement that the company shall hold said certificates as security for the performance by the vendor of each and all of the covenants and conditions of this agreement and that upon the refusal, neglect or omission of the vendor, its successors or assigns, to perform this agreement, or any part thereof, the said shares of stock and certificates represented thereby shall be immediately sold by the company at public or private sale, without notice, upon such terms and at such price as the company or its officers may deem reasonable, and that the proceeds of the sale be paid into the treasury of the company as agreed and liquidated damages to the company for the breach of said agreement.

The parties hereto have fixed upon the said stock, and the proceeds thereof, as liquidated damages, because of the difficulty in establishing, in a court of law, the actual damage that would be suffered by the company in the event of the refusal, neglect or omission to perform this agreement, and in order to avoid the difficulty of such proof.

In witness whereof, the vendor and the company have respectively caused this agreement to be executed by their respective presidents and their respective corporate seals to be hereto attached pursuant to resolutions of their respective boards of directors, the day and year first above written.



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being the cost of production with a slight profit added thereto, sufficient to cover incidental expenses merely. The prices at which said goods were to be nominally sold by said so-called vendors to said company are set forth in the schedule attached to said "Exhibit 1" and marked "A."

Said agreement further nominally provided that the goods pretended to be acquired by the company, from the so-called vendor, which were to be sold by jobbers, should be so sold by the company and not by the vendor, for the account of the company, but that the goods acquired by the company from the so-called vendor, which should be sold to wholesalers other than jobbers, should be sold by the so-called vendor for the account of the company.

The schedule attached to said agreement contained a list of prices for all commodities in the wall paper line, which were called "List" or "Road price," and said contract provided that sales made to jobbers should be made at discounts from said "List" or "Road prices" fixed in the schedule marked "B," annexed to said "Exhibit 1," but that, in all cases in which the goods were manufactured at places other than the cities of New York or Philadelphia, and sold to jobbers, the vendor should equalize the freights with either of the said cities, out of the proceeds receivable for such goods.

[243] In reality, the agreement was, and so the business was carried on, that the manufacturers should maintain sample rooms and selling agents, and should solicit and receive the orders from all wholesalers, whether jobbers or so-called "Road" or "Quantity buyers;" that the entire business should be done by said so-called vendors, but payments should be made by the jobbers to the so-called company, and by the wholesalers, other than jobbers, directly to the so-called vendors.

Said contract further provided, in order to protect said corporations and firms against competition from each other, and to insure against violation of said agreement, or any of them, that, from time to time, invoices should be supplied, at once to the customer and to the company, upon shipment and delivery of such goods, specifying quantities and road prices; that each vendor should furnish to the company, at

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periods stated, just, true, and sworn statements of all shipments and deliveries of merchandise made by the vendors direct to the purchasers, which statements should contain the names of the purchasers, the character of the goods sold, and the prices at which they were sold, so that the company might receive the difference between the prices at which the goods were nominally billed to said company, and at which they were sold to the purchaser, to the end that this difference, being the net profits derived from such purchase and sale, should be divided among such corporations and firms, in proportion to the capacity of their respective businesses, determined as aforesaid, without regards to the amount sold by each.

The prices at which, and the terms upon which, goods were to be sold by the vendors to all wholesalers other than jobbers, were designated "Road" or "List" prices, and were contained in the schedule marked "C," annexed to said "Exhibit I," and forming a part thereof.

For the further purpose of carrying out said agreement, and ascertaining said net profits, and for further disguising the real nature of the transaction, it was provided that the so-called vendor should receive from sales made by it to so-called [244] "Quantity buyers," the difference between the discounts allowed to those designated in the classification hereinbefore referred to as "Second-class jobbers" and the discounts provided in said agreement to be made to purchasers styled, in said schedules, "Quantity buyers" in which the vendor is allowed the quantity discount, except that, where special and exclusive goods were sold, there should be an allowance of thirty (30 per cent) per cent discount to said vendor.

Said agreement further stipulated that the prices of goods as fixed by said schedules A and C might be altered from time to time, but the discounts allowed to jobbers should not be altered at any time during the term of the agreement.

Said written contract further provided that the so-called vendor should make collections of accounts for goods sold to wholesalers other than the jobbers, but that the company should collect the proceeds of sales to the jobbers, and that

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accounts should be stated between the so-called vendors and the company at stated periods, and the amount accompanied by payment, by the so-called vendor, to the so-called company, of the difference between the prices at which the goods were to be billed to the company and the prices at which the so-called vendors had agreed to charge the "Quantity buyers."

It was further stipulated in said agreement that monthly divisions should be made by said company of at least thirty (30) per cent of the "Road prices" of goods shipped to jobbers by the company.

For the further purpose of protecting said corporations and firms and individuals from each other, preventing and stifling competition, and enforcing said combination, trust and monopoly, each of said corporations and vendors gave the company the right, and made it the duty of the company, to audit the books of account of said so-called vendors, at such times and in such manner as the company might from time to time deem necessary or proper. It was further stipulated that this right to examine and audit the books was of the essence of the agreement, and that a failure on the part of the so-called ven- [245] dor, to permit the same, should operate as a breach of the contract, entitling the company to abrogate the agreement, to recover such damages as it might be able to establish, and to the forfeiture of the stock held by said vendor in such company.

It was further provided that said so-called company should appoint an auditing committee from its directors, which should establish such a system of bookkeeping as it thought advisable.

\* \* \* \* \*

It was further a part of said agreements, though not reduced to writing, save as it set forth in said exhibit, that all jobbers and other wholesalers of wall paper should be forced to sign an agreement, binding themselves to purchase their entire stock of wall paper, nominally either from plaintiff or from said corporations or firms, at prices fixed in said "Exhibit 1," and that they should only sell at prices fixed in the schedules attached to said "Exhibit 1," under

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the penalty, which the combination of all of said corporations and firms enabled them to enforce, that such jobbers or wholesalers, in case of refusal to accede to the terms so imposed, or in case of violation thereof, should be unable to buy wall paper; should be driven out of business, and should sacrifice the good-will and capital therein invested.

\* \* \* \* \*

In the further carrying out of said purpose, said plaintiff and other persons, natural or artificial, engaged in the manufacture and sale of wall paper in different States of the Union, and in trade and commerce between the several States and foreign countries, whose names and locations these defendants are unable to state, entered into contracts substantially similar to "Exhibit 1," except that, instead of such persons pledging stock in plaintiff as security for the performance, by them, of the stipulations of said contract, they gave other security, the nature of which these defendants are unable to state, and which such other persons assume obligations, and gave, to said plaintiff, rights and powers, and said plaintiff exercised, as to them, such rights and powers, as were created by said instru[246]ment "Exhibit 1," and were exercised by plaintiff and its officers and directors in relation to the persons, natural or artificial, who were theretofore members of such combination and trust.

In the further carrying out of said scheme to stifle competition; to restrain commerce between the States and Territories of the United States and with foreign countries; to unduly and unreasonably enhance prices, it was further agreed between the members of said combination and trust, that the so-called directors of plaintiff, being really a committee appointed, as aforesaid, by said the members of said trust or combination, should arbitrarily classify the wholesale dealers of wall paper in the United States and Territories thereof, into two (2) classes, namely, jobbers and "Road" or "Quantity buyers;" that they should further arbitrarily classify the jobbers into "first class," and "second class" and "third class" jobbers; that they should further arbitrarily classify the other wholesalers into "Road" or "Quantity buyer," and "Special buyers;" that, being thus classified, they should all be compelled to sign written agree-

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ments, nominally with said company, really with said members of said combination or trust, obligating them to buy their entire stock of merchandise from said company.

A copy of said agreement so to be signed by said jobbers, is attached hereto, marked "Exhibit 2" [which is in margin \*] and [247] made part hereof, the same being printed

## \* EXHIBIT 2.

An agreement made this — day of —, in the year one thousand eight hundred and ninety-eight, between the Continental Wall Paper Company, a corporation organized under the laws of the State of New York, (hereinafter called the company), party of the first part, and —, of —, (hereinafter called the jobber), party of the second part.

In consideration of the sum of one dollar, paid by the jobber unto the company for granting of this agreement, the receipt whereof is hereby acknowledged, and other valuable considerations, it is agreed between the parties hereto as follows:

First. That the company will sell, subject to such credit limitation as it may impose, and the jobber will purchase the entire requirements of the jobber in his business of selling wall paper for the business year ending July 1, 1899, to the amount of a gross value, without discounts, of —, the jobber reserving to himself the right to purchase such merchandise as he may need in excess of — from others.

The company is to deliver the goods without additional charge f. o. b. at New York or Philadelphia, or to equalize freights from the places at which it makes deliveries to either of said cities.

Second. The jobber shall be allowed discounts at the rates shown in the accompanying schedule, marked "A," which is hereby embodied in this agreement as a part thereof.

The terms of payment to be as follows: Four months from the date of invoice, with discount at the rate of 1 per cent per month for anticipated payment; provided settlement be made within 30 days from date of shipment, either by cash or note. Invoices for all goods shipped between October 15 and March 1 to take the latter date.

Third. Attached hereto, marked "B," is a schedule of the road prices at which the company sells its goods for the term embraced in this contract to dealers other than jobbers, and also a statement of discounts allowed to such customers other than jobbers for quantity purchases, together with the terms of credit and freight allowance to which such customers are entitled.

It is an essential condition of this agreement that the jobber will not directly or indirectly sell or offer for sale any of the merchandise purchased from the company hereunder at lower prices or upon

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forms with blanks for names, dates and amounts of purchases.

To conceal the fact that it was an agreement to purchase from no one but said company, and the members of said combination and trust, the amount of purchases made by the buyer, in the previous year, from all the members of said combination or trust, being the entire amount of purchases made by such [248] buyer, during the preceding year, was ascertained, and an amount at least double thereof, being an amount supposed to be, and which was in fact, more than, by any possibility, could be needed by such buyer, was inserted in said blank as the amount to be purchased by such buyer from the company.

By said agreement, the prices to be paid by the jobber were fixed according to the class in which he was arbitrarily placed, at prices enumerated in schedule B, attached to said "Exhibit 1," and the prices at which, alone, said jobber could sell, were fixed as shown by schedule C, attached to said "Exhibit 1."

\* \* \* \* \*

Schedule A attached to said "Exhibit 2" is the same, so far as relates to jobbers of the class with whom the agreement is made, as the corresponding provisions of schedule B, attached to said "Exhibit 1" and schedule B, attached to "Exhibit 2" is the same as schedule C, attached to "Exhibit 1." The members of said combination and trust, and said plaintiff, further to carry out said agreement, compelled all other wholesale and quantity buyers to sign agreements in the form attached to this answer, marked "Exhibit 3"

better or more favorable terms than those shown in schedule "B," the intent hereof being to assure the company against the use by the jobbers of this agreement to undersell the company.

The prompt performance by the jobber of the provisions of this agreement as to payment and otherwise is a condition precedent to exacting the continuous performance of said agreement by the company.

In witness whereof the company has caused this instrument to be executed, and the jobber has hereunto set his hand, the day and year first above written.

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[which is in the margin \*], and [249] filed herewith; the same being a printed form with blanks for signatures and having attached thereto the prices shown in schedule C, attached to "Exhibit 1," which are the list prices referred to in said agreement.

All said agreements, "Exhibits 1, 2, and 3" were drawn for the purpose, and with the intent of disguising the real nature of the transaction and the real purpose, as herein set forth.

In further carrying out said combination and with said purpose and intent, agreements were made by plaintiff and the members of said combination and trust, and persons, natural and artificial, in the Dominion of Canada, by which each agreed not to compete with the other, nor cut prices, the Americans in Canada, the Canadians in the United States.

On, before and after said first day of July, A. D. 1898, this defendant had a large and profitable business of long standing, possessing a valuable good will, and in which they had a large capital invested, being what is generally called the business of a jobber or wholesaler of wall paper in the State of Ohio and throughout the States and Territories of the United States.

## \* EXHIBIT 3.

In consideration of your having sold us wall paper, etc., at list prices and at quantity discounts as per following schedule:

|                                | Rolls. | Per cent. | Rolls. | Per cent. |
|--------------------------------|--------|-----------|--------|-----------|
| Up to 54 cents, inclusive..... | 600    | 5         | 1,200  | 10        |
| 6 to 9 cents, inclusive.....   | 300    | 7½        | 600    | 12½       |
| 10 to 15 cents, inclusive..... | 200    | 10        | 400    | 15        |
| 16 cents and up.....           | 100    | 10        | 200    | 15        |

Discount on borders and ceiling papers follow the discounts on the hangings they match.

Plain Ingrains.

Varnish tiles, 200 rolls or more, 10 per cent.

Ingrain borders, 26 rolls of a kind, 10 per cent.

Ingrain borders, 50 rolls or over, 15 per cent.

We hereby agree not to sell any of such goods to others on terms better or more favorable than those specified in the above schedule nor lower than said list prices, and our faithful performance of this agreement is a condition precedent to the filing of our order.

The intent hereof is to protect you fully against being undersold by us among customers to whom you do allow quantity discounts.

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The defendant and all other persons engaged in the wholesale wall paper business, at the beginning of each season, which commenced in September and closed the first of July, following, according to the custom of the trade, bought from the various persons engaged in the manufacture and sale of wall paper in the United States, being the persons, members of said combination and monopoly, their stock of wall paper to be sold by them during the ensuing year, such stock to be manufactured for them from samples submitted at the beginning of said season, in wholesale lots, and those for defendant to be shipped to Cincinnati, Ohio, and there resold by defendant, from time to time, to retail dealers throughout the States of Ohio, Kentucky, [250] Indiana, Illinois, and other States and Territories of the United States.

At said time said members of said combination and trust having, by the agreements and acts aforesaid, obtained the control of the wall paper trade throughout the United States, at once greatly advanced the price of said wall paper, and threatened defendant that, unless it signed said agreement, "Exhibit 2," no wall paper would be sold to it; that said combination would make it impossible for it to buy wall paper, or to continue its business, and would drive it out of its said business, and compel it to sacrifice the good will owned by it as aforesaid, and the capital invested by it in said business.

Said combination or trust then, and from that time thereafter, until the first day of July, A. D. 1900, had the power, by means of said combination and said agreements, and the will, to carry out its said threats, and deprive these defendants or any person, firm or corporation engaged in the business of selling wall paper in the United States, of the power to obtain wall paper for its or their trade, and the will and the power to drive out of business any person, firm, or corporation engaged in the business of selling wall paper; deprive them of their good will, and compel them to sacrifice the capital invested in the business.

In like manner, by the same means, all other jobbers and wholesalers of wall paper in the United States, and all persons engaged in commerce in the wall paper trade between the several States of the Union and foreign countries, were



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compelled to, and did sign the agreements attached to this answer, as "Exhibits 2 and 3."

The immediate, intended and direct effect of the said combination and agreements was the stifling of competition between said manufacturers and vendors of wall paper, and between the jobbers and wholesalers thereof, and to unduly enhance the price of wall paper, making it one-half more than the price which it would be had the same been left to free and unrestrained competition; to compel said jobbers and whole[251]salers to pay such unduly enhanced and unreasonable price to plaintiff, and to members of said combination, and to exact from others an unduly enhanced price.

After the making of said agreements, as before, the members of such combination solicited and received orders from this defendant, and all other wholesalers; filled their orders; charged the prices fixed in said schedules attached to said "Exhibit 1" and directed that payment for such merchandise should be made by the jobbers to said plaintiff combination for said several members of said combination and trust, to be divided in the manner aforesaid. Said combination contrived, intended and did prevent free and unrestrained competition between the producers, and between the purchasers of wall paper, and between the jobbers and wholesalers of wall paper throughout the United States.

Defendant avers that said plaintiff, and the members of said combination as aforesaid, being more than two persons, firms, corporations, partnerships, and associations, combined capital and skill for each and all of the following purposes, to wit: To create restrictions in trade and commerce; to carry out restrictions in trade and commerce; to limit the product of wall paper; to reduce the production of wall paper; to increase the price of wall paper; to prevent competition in the manufacturing and making of wall paper; to prevent competition in the sale of wall paper; to prevent competition in the purchase of wall paper; to fix a standard or figure whereby its price to the public or consumer should be controlled and established as to an article or commodity of merchandise, to wit: Wall paper intended for sale, use and consumption in the States of Ohio, Indiana, Kentucky, and

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Illinois; to make and enter into contracts, obligations and agreements by which they bound themselves not to sell or dispose of wall paper below a common standard figure or fixed value; to carry out contracts, obligations and agreements by which they bound themselves not to sell or dispose of wall paper below a common standard figure or fixed value; to make and enter into contracts, obligations [252] and agreements by which they agreed to keep the price of wall paper at a fixed or graduated figure; to carry out contracts, obligations and agreements by which they agreed to keep the price of wall paper at a fixed or graduated figure; to make and enter into contracts, obligations and agreements by which they established and settled the price of wall paper between themselves and between themselves and others, so as to both directly and indirectly preclude a free and unrestricted competition among themselves, and among themselves and purchasers, and among purchasers in the sale of wall paper; to carry out contracts, obligations and agreements by which they established and settled the price of wall paper between themselves and themselves and others, so as to both directly and indirectly preclude a free and unrestricted competition both between themselves, and between themselves and purchasers, and between purchasers in the sale of wall paper; to make and enter into contracts, obligations and agreements by which they agreed to pool, combine, and both directly and indirectly unite the interests they had connected with the sale of wall paper so that its price might be affected; to carry out contracts, obligations and agreements by which they agreed to pool, combine and both directly and indirectly unite the interests that they had connected with the sale of wall paper so that its price might be affected.

Said contracts and agreements were each and all combinations and conspiracies in restraint of trade and commerce among the several States, and with foreign nations, and had the intent and effect of restraining trade and commerce between the several States and with foreign nations, and were an attempt, by combinations and conspiracy, between the members of said combination and trust to monopolize the trade and commerce in wall paper among the several States

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and with foreign nations, and, by said contracts, and the acts done by members thereof, and by said plaintiff under and in pursuance thereof said plaintiff and the said members of said combination or trust did monopolize and attempt to monopolize the trade and [253] commerce in wall paper among the several States and with foreign nations.

In further carrying out of said scheme and combination the members thereof delivered to this defendant, in the year from September, A. D. 1898, to September, A. D. 1899, wall paper for which this defendant paid to said plaintiff, for and per direction of the members of said combination, the sum of one hundred and forty-four thousand eight hundred and fifty-four dollars and fourteen cents (\$144,854.14).

These defendants aver that the prices charged in said Exhibit attached to said amended petition [which are itemized accounts showing each article and the price therefor alleged to have been sold and delivered to the defendant] *are the prices fixed and determined in pursuance of and by the combination or trust agreement, as above set forth, and are unreasonable, unjust and excessive and at least one-half more than they would otherwise have been. In transacting all business aforesaid, at all said times, said business was transacted under and in pursuance of said combination or trust agreement, and for the purposes and each of them, above specified, and not otherwise.*

The allegations in said plaintiff's petition set forth as a suit on account are an attempt to enforce, carry out and recover upon and by virtue of said unlawful combination, aforesaid, *the prices fixed by such combination, and the prices therein sought to be recovered for said merchandise are unreasonable, excessive and above the fair market price of such merchandise by more than the amount so sought to be recovered.*

Each and all of the provisions of said contract and agreement between said members of said combination and each other; between said so-called vendors and said plaintiff; between said members of said combination and said plaintiff and the so-called jobbers; between the members of said combination and trust and said plaintiff and the so-called

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"Road" or "Quantity buyers," are each and all contrary to the provisions of the statutes of the State of New York, where said plaintiff was organized; contrary to the provisions of the laws of the [254] State of Ohio, where the merchandise was delivered; contrary to the laws of the several States where each of the members of said combinations did business; contrary to the laws of the United States; and made criminal by the laws of each of said several States and by the laws of the United States; and each and all of said agreements aforesaid are contrary to public policy, and in violation of the rights of the defendant, and injurious to the interests of the consumer and of the public.

Mr. Justice HARLAN (after making the above statement) delivered the opinion of the Court.

The Anti-Trust Act of 1890 declares illegal every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, and also declares it to be a misdemeanor, punishable by fine or imprisonment, or both, for any one to make any such contract or to engage in any such combination or conspiracy. § 1. It is also made a misdemeanor, punishable by fine or imprisonment, or both, for any one to monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States or with foreign nations. § 2. Similar provisions were made in reference to contracts, combinations in the form of trust or otherwise, or conspiracies, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or between any such Territory or another, or between any such Territory or Territories and any State or States or the District of Columbia or with foreign nations, or between the District of Columbia and any State or States or foreign nations. § 3. The act further provided that any person injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful, may sue therefor in the Circuit Court of the United States in the district where the defend-

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ant resides or is found, without regard to the amount [255] in controversy, and recover threefold the damages sustained by him. § 3. 26 Stat. 209.

The defendant contends that under the facts admitted by the demurrer it must be taken that the Continental Wall Paper Company is the representative in this suit of a combination or trust formed for the purpose of restraining and monopolizing trade and commerce among the several States in the manufacturing, buying, selling and dealing in wall paper; that this combination has the direct effect to accomplish that purpose; that the defendant, engaged in buying and selling wall paper in Ohio and other States, was compelled to become a party to the illegal combination or go out of business; that the account in suit was made up, as to prices and terms of sale, not upon the basis of an independent, collateral contract for goods sold and delivered, but with direct reference to, in conformity with and for the object of enforcing the agreements that constituted, or out of which came, the illegal combination whose business is carried on under the name of the Continental Wall Paper Company; that a judgment against the defendant upon the account in suit will, in effect, legally and practically aid the combination to reap the fruits of agreements that were illegal under the acts of Congress, and the making of which was declared by that act a crime; consequently, that the petition upon the facts admitted was properly dismissed.

That the combination represented by the plaintiff company is within the prohibitions of the above act of Congress is clear from the facts admitted by the demurrer. We assume, therefore, without discussion—for discussion is unnecessary—that there is a combination, of which the Continental Wall Paper Company is the representative, and that, in violation of that act, such combination was formed with the intent, and will have the effect, directly, to restrain as well as monopolize trade and commerce among the several States and with foreign nations as involved in the manufacture, sale and transportation of wall paper among the several States and with foreign nations. This part of the case is

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forcibly presented by the Cir[256]cuit Court of Appeals which, in its opinion delivered by Judge Lurton, well said:

"The conspiring mills were situated in many States. The consumers [of wall paper] embraced the whole citizenship of the United States. The jobbers and wholesalers, who were to be coerced into contracts to buy their entire demands from the Continental Wall Paper Company or be driven out of business, were in every State. Before the combination each of the combining companies was engaged in both State and interstate commerce. The freedom of each, with respect to prices and terms, was restrained by the agreement and interstate commerce directly affected thereby, as well as by the enhancement of prices which resulted. A more complete monopoly in an article of universal use has probably never been brought about. It may be that the wit of man may yet devise a more complete scheme to accomplish the stifling of competition. But none of the shifts resorted to for suppressing freedom of commerce and securing undue prices, shown by the reported cases, is half so complete in its details. None of the schemes with which this may be compared is more certain in results, more widespread in its operation, and more evil in its purposes. It must fall within the definition of a 'restraint of trade,' whether we confine ourselves to the common law interpretation of that term or apply that given to the term as used in the Federal act," 148 Fed. Rep. 939, 947.

But it is contended that however illegal the combination represented by the plaintiff may be, and whatever may be the effect of a judgment against the defendant, the plaintiff company is entitled to a judgment under the principles announced in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 545. Let us see what that case was and whether it may not be distinguished from the one now before us.

The Union Sewer Pipe Company, a corporation of Ohio, doing business in Illinois, brought suit against Connolly, a citizen of Illinois, upon promissory notes given in Illinois on account of the purchase by the defendant from that company, under contracts made in that State, of sewer pipe known as [257] Akron pipe. It also brought suit against one Dee, a citizen of Illinois, upon an open account for the value of similar sewer pipe sold to him under a written contract, also made in that State. In each case the defendant disputed his liability for the value of the goods obtained from the Sewer Pipe Company upon the ground that at the time of their respective purchases that company was in a com-

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bination with certain firms, corporations and companies engaged in the manufacture of Akron pipe, which combination, it was alleged, was in illegal restraint of trade, and forbidden by the principles of the common law, as recognized and enforced both in Ohio and Illinois. The defense was also made that the Sewer Pipe Company was a combination doing business throughout the United States and between Ohio and Illinois, in the form of a trust, in restraint of trade and commerce among the several States, contrary not only to the Anti-Trust Act of Congress of July 2d 1890, c. 647, but contrary to the Illinois Anti-Trust statute of January 1st 1893, forbidding, under penalties, the combination of capital, skill or acts for certain specified purposes. 26 Stat. 209; Laws Ill. 1893, p. 182; Hurd's Rev. Stat. Ill. 1899, p. 618, title Criminal Code.

The defense based upon the principles of the common law was overruled in the *Connolly case*, the court saying:

"Assuming, as defendants contend, that the alleged combination was illegal if tested by the principles of the common law, still it would not follow that they could, at common law, refuse to pay for pipe bought by them under special contracts with the plaintiff. The illegality of such combination did not prevent the plaintiff corporation from selling pipe that it obtained from its constituent companies, or either of them. It could pass a title by a sale to any one desiring to buy, and the buyer could not justify a refusal to pay for what he bought and received by proving that the seller had previously, in the prosecution of its business, entered into an illegal combination with others in reference, generally, to the sale of Akron pipe."

Again, after referring to several cases establishing the general [258] principle that a court will not lend assistance to carry out the terms of an illegal contract, and that one purchasing and receiving goods under a contract, expressed or implied, to pay for them, cannot refuse to pay simply because of the illegal character of his vendor, the court proceeded:

"In the present [Connolly] case other considerations must control. This is not an action to enforce or which involves the enforcement of the alleged arrangement or combination between the plaintiff corporation and other corporations, firms and companies in relation to the sale of Akron pipe. As already suggested, the plaintiff, even if part of a combination illegal at common law, was not for that reason

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forbidden to sell property it acquired or held for sale. The purchases by the defendants had no necessary or direct connection with the alleged illegal combination; for the contracts between the defendants and the plaintiff could have been proven without any reference to the arrangement whereby the latter became an illegal combination. If, according to the principles of the common law, the Union Sewer Pipe Company could not have sold or passed title to any pipe it received and held for sale, because of an illegal arrangement previously made with other corporations, firms or companies, a different question would be presented. But we are aware of no decision to the effect that a sale similar to that made by the present plaintiff to the defendants respectively would, in itself, be illegal or void under the principles of the common law. The contracts between the plaintiff and the respective defendants were, in every sense, collateral to the alleged agreement between the plaintiff and the other corporations, firms or associations whereby an illegal combination was formed for the sale of sewer pipe."

Turning to the defense based on the Anti-Trust Act of Congress, the court in the *Connolly* case said:

"Much of what has just been said in reference to the first special defense based on the common law is applicable to this part of the case. If the contract between the plaintiff corporation and the other named corporations, persons, and companies or the combination [259] thereby formed, was illegal under the act of Congress, then all those, whether persons, corporations or associations, directly connected therewith, became subject to the penalties prescribed by Congress. But the act does not declare illegal or void any sale made by such combination, or by its agents, of property it acquired or which came into its possession for the purpose of being sold—such property not being at the time in the course of transportation from one State to another or to a foreign country. The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid."




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## Further:

"Nor can the defendants refuse to pay for what they bought upon the ground that the seventh section of the Sherman Act gives the right to any person 'injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful' by the act, to sue and recover treble the damage sustained by him. We shall not now attempt to declare the full scope and meaning of that section of the act of Congress. It is sufficient to say that the action which it authorizes must be a direct one, and the damages claimed can not be set off in these actions based upon special contracts for the sale of pipe that have no direct connection with the alleged arrangement or combination between the plaintiff and [260] other corporations, firms or companies. Such damages can not be said, as matter of law, to have directly grown out of that arrangement or combination, and are, besides, unliquidated. Besides, it is well settled in Illinois that 'unliquidated damages arising out of covenants, contracts or torts disconnected with plaintiff's claim can not be set off under the statute.'"

We need not here refer to that part of the *Connolly case* relating to the defense based on the anti-trust act of Illinois; for, the court adjudged that act to be void because of a certain provision in it which, contrary to the Constitution of the United States, denied the equal protection of the laws to all persons within the jurisdiction of the State, except a named favored class.

The present case is plainly distinguishable from the *Connolly case*. In that case the defendant, who sought to avoid payment for the goods purchased by him under contract, had no connection with the general business or operations of the alleged illegal corporation that sold the goods. He had nothing whatever to do with the formation of that corporation, and could not participate in the profits of its business. *His* contract was to take certain goods at an agreed price, nothing more, and was not in itself illegal, *nor part of nor in execution of any general plan or scheme that the law condemned*. The contract of purchase was wholly collateral to and independent of the agreement under which the combination had been previously formed by others in Ohio. It was the case simply of a corporation that dealt with an entire stranger to its management and operations and sold goods that it owned to one who wished to buy them. In short, the defense in the *Connolly case* was that the plaintiff



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corporation, although owning the pipe in question and having authority to sell and pass title to the property, was precluded by reason *alone* of its illegal character from having a judgment against the purchaser. We held that that defense could not be sustained either upon the principles of the common law or under the Anti-Trust Act of Congress.

[261] The case now before us is an entirely different one. The Continental Wall Paper Company seeks, in legal effect, the aid of the court to enforce a contract for the sale and purchase of goods, which, *it is admitted by the demurrer was in fact and was intended by the parties to be based upon agreements that were and are essential parts of an illegal scheme.* We state the matter in this way, because the plaintiff by its demurrer admits for the purposes of this case the truth of all the facts alleged in the third defense. It is admitted by the demurrer to that defense that the account sued on has been made up *in execution of the agreements* that constituted or out of which came the illegal combination formed for the purpose and with effect of both restraining and monopolizing trade and commerce among the several States.

The present suit is not based upon an implied contract of the defendant company to pay a reasonable price for goods that it purchased, but upon agreements, to which both the plaintiff and the defendant were parties, and *pursuant to which* the accounts sued on were made out, and which had for their object, and which it is admitted had directly the effect, to accomplish the illegal ends for which the Continental Wall Paper Company was organized. If judgment be given for the plaintiff the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination. These considerations make it evident that the present case is different from the *Connolly case*. In that case the court regarded the record as presenting the question whether a voluntary purchaser of goods at stipulated prices, under a collateral, independent contract, can escape an obligation to pay for them upon the ground *merely* that the seller, which owned the goods was an illegal combination or trust. We held that he could not, and nothing more touching that question was decided or intended

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to be decided in the *Connolly case*. The question here is whether the plaintiff company can have judgment upon an account which, it is admitted by demurrer, was made up, within the knowledge of [262] both seller and buyer, with direct reference to and in execution of certain agreements under which an illegal combination, represented by the seller, was organized. Stated shortly, the present case is this: The plaintiff comes into court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the States and asks a judgment that will give effect, as far as it goes, to agreements that constituted that combination, and by means of which the combination proposes to accomplish forbidden ends. We hold that such a judgment can not be granted without departing from the statutory rule, long established in the jurisprudence of both this country and England, that a court will not lend its aid, in anyway, to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which as between man and man he ought, perhaps, to pay, but for which he is unwilling to pay.

In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties. It is of no consequence that the present defendant company had knowledge of the alleged illegal combination and its plans or was directly or indirectly a party thereto. Its interest must be put out of view altogether when it is sought to have the assistance of the court in accomplishing ends forbidden by the law.

In *Hanauer v. Doane*, 12 Wall. 342, 349, this court said:

"The whole doctrine of avoiding contracts for illegality and immorality is founded on public policy. It is certainly contrary to public policy to give the aid of the courts to a vendor who knew that his goods were purchased, or to a lender who knew that his money was borrowed, for the purpose of being employed in the commission of a criminal act, injurious to society or to any of its members."

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In *McMullen v. Hoffman*, 174 U. S. 639, 654, 669, where [263] the authorities are reviewed and the whole subject carefully examined, the court said:

"The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract" (citing many English and American cases). "The court refuses to enforce such a contract, and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest. It has been often stated in similar cases that the defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions. To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them. In that way the public secures the benefit of a rigid adherence to the law."

In that case the principle announced in *Coppell v. Hall*, 7 Wall. 542, 548, was reaffirmed, namely:

"Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reason. Wherever the contamination reaches it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."

In *Embrey v. Jemison*, 131 U. S. 336, 348, the defendant, who was sued upon promissory given in execution of a previous verbal contract that was illegal, this court said that he could not "be permitted to withdraw attention from this [263] feature of the transaction by the device of obtaining notes for the amount claimed under the illegal agreement; for they are not founded on any new or independent consideration, but are only written promises to pay that which the obligor had verbally agreed to pay. They do not, in any just sense, constitute a distinct or collateral contract based

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upon a valid consideration. Nor do they represent anything of value in the hands of the defendant which, in good conscience, belongs to the plaintiff or to his firm. Although the burden of proof is on the obligor to show the real consideration, the execution of the notes could not obliterate the substantive fact that they grew immediately out of and are directly connected with a wagering contract. They must, therefore, be regarded as tainted with the illegality of that contract, the benefits of which the plaintiff seeks to obtain by this suit. That the defendant executed the notes with full knowledge of all the facts is of no moment. The defense he makes is not allowed for his sake, but to maintain the policy of the law. *Coppell v. Hall*, 7 Wall, 542, 558."

In *Montague & Co. v. Lowry*, 193 U. S. 38, 45, 46, which involved, in part, the question whether a particular contract made in California for the purchase of tiles related to interstate commerce, and was illegal, the court said:

"The provision as to this sale is but a part of the agreement, and it is so united with the rest as to be incapable of separation without at the same time altering the general purpose of the agreement. The whole agreement is to be construed as one piece, in which the manufacturers are parties as well as the San Francisco dealers, and the refusal to sell on the part of the manufacturers is connected with and a part of the scheme which includes the enhancement of the price of the unset tiles by the San Francisco dealers. The whole thing is so bound together that when looked at as a whole the sale of unset tiles ceases to be a mere transaction in the State of California, and becomes a part of a purpose which, when carried out, amounts to and is a contract or combination in restraint of interstate trade or commerce."

[265] So, in *Swift & Co. v. United States*, 196 U. S. 375, 396:

"The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body, and for all that we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. *Aikens v. Wisconsin*, 195 U. S. 194, 206."

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In *Bement v. National Harrow Company* 186 U. S. 70, 87, 88, the court, after referring to that section of the act of Congress relating to suits by the Attorney General and by persons injured in their business or property, said:

"Assuming that the plaintiff is right so far as regards any suit brought under that act, we are nevertheless of opinion that any one sued upon a contract may set up as a defense that it is a violation of the act of Congress, and if found to be so, that fact will constitute a good defense to the action. The first section of the act provides that 'every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.' Every person making such a contract is deemed guilty of a misdemeanor, and on conviction is to be punished by fine or by imprisonment, or both. As the statute makes the contract in itself illegal, no recovery can be had upon it when the defense of illegality is shown to the court. The act provides for the prevention of violations thereof, and makes it the duty of the several district attorneys, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations, and it gives to any person injured in his business or property the right to sue, but that does not prevent a private individual when sued upon a contract which is void as in violation of the act from setting it up as a defense, and we think when proved it is a valid defense to any claim made under a contract thus denounced as illegal."

Again, in the recent case of *Loewe v. Lamlor*, 208 U. S. 274, 301, which involved the inquiry whether certain acts could be regarded as in restraint of inter-state commerce, the court said:

"So that, although some of the means whereby the interstate traffic was to be destroyed were acts within a State and some of them were in themselves as a part of their obvious purpose and effect beyond the scope of Federal authority, still, as we have seen the acts must be considered as a whole, and the plan is open to condemnation, notwithstanding a negligible amount of intrastate business might be affected in carrying it out. If the purpose of the combination was, as alleged, to prevent any interstate transportation at all, the fact that the means operated at the one end before physical transportation commenced and at the other end after the physical transportation ended, was immaterial."

See also *Gibbs v. Baltimore Gas Co.*, 130 U. S. 396, 412.

The adjudged cases all hold that upon the question whether the particular contract sought to be enforced arises out of an illegal transaction, the court will not be restricted to a partial

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statement of the facts but will consider all the circumstances connected with the transaction so as to ascertain its real nature. In *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 247, the court said that

"all the facts and circumstances are, however, to be considered in order to determine the fundamental question whether the necessary effect of the combination is to restrain interstate commerce."

Upon the whole case, and without further citation of authorities, we adjudge, upon the admitted facts, that the combination, represented by the plaintiff in this case, was illegal under the Anti-Trust Act of 1890; that it is to be taken as one intended, and which will have the effect directly, to restrain and monopolize trade and commerce among the several States and with foreign States; and that the plaintiff can not have a judgment for the amount of the account sued on, because, for [267] the reasons we have stated, such a judgment would, in effect, aid the execution of the agreements which constituted that illegal combination. We consequently hold that the Circuit Court of Appeals properly sustained the third defense, and rightly dismissed the suit. Its judgment must be affirmed.

It is so ordered.

Mr. Justice HOLMES, with whom concurred Mr. Justice BREWER, Mr. Justice WHITE, and Mr. Justice PECKHAM, dissenting:

This action is for goods admitted to have been sold and delivered by the plaintiff to the defendant, and the question arises, as has been explained, on demurrer to the third defense. The elements of that defense may be stated in a few words. Nearly all the manufacturers of wall paper in the United States formed a combination which, under the present policy of the law, was an illegal attempt to restrain and monopolize trade in and among the several States. As a part of the scheme the plaintiff corporation was created, which by the agreement became the purchaser of the products of the constituent companies, and was to sell the same, although the constituent companies continued to manufacture and to carry on the business of soliciting orders. The only material facts about this agreement are that under it the plaintiff got

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title to the goods, that it fixed prices at which goods were to be sold, and that it contemplated compelling the jobbers and others who bought to purchase at those prices, if they were to get any paper at all. The conspirators threatened and had the power to drive any jobber out of business who did not come in.

In pursuance of the combination and its purpose the defendant, a jobbing house, and all other jobbers, were compelled to sign a contract which, in effect, bound them to buy all the wall paper needed in their business from the plaintiff at the above-mentioned prices, and which made it an "essential condition of this agreement" that they should not sell at lower prices [268] or upon better terms than those at which the plaintiff sold. After these two contracts were made the defendant ordered the goods in question at the prices named. It is alleged that those prices were unreasonable, and it is alleged, repeatedly and with much detail, that all the arrangements were made and all the business was done in furtherance of the plan set forth, contrary to the law of the United States and of the States concerned, and in violation of the defendant's rights, this suit being the final step in the attempt to carry out the plan.

It seems to me that the foregoing facts show no defense. I will consider them in their successive degrees of connection with the affair, and in the first place will take up the terms of the actual contracts in suit. These were ordinary parol sales made by the owner of goods. The suit was not upon the general agreement between the plaintiff and defendant. That by itself sold nothing, and it may be questioned whether it purported absolutely to bind the defendant to buy a roll of paper. See *Dennis v. Slyfield*, 117 Fed. Rep. 474. *Sterling Coal Co. v. Silver Spring Bleaching & Dyeing Co.*, 162 Fed. Rep. 848, 850. The actual contracts by which the plaintiff bound itself to deliver, and the sales under which it did deliver the specific goods for which it seeks to recover the price, were made after the making of the general agreement, as it is apparent on the face of that agreement that they must have been, and as is alleged by the answer in so many words. Each was a separate transaction. There is nothing



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alleged concerning the terms of these parol sales that has any element of illegality about it.

Next as to the effect of the general agreement between the plaintiff and defendant. It is alleged that after it was made the members of the combination solicited, received and filled orders, and charged the prices fixed in the original combination agreement. It is not alleged that either agreement was referred to even by implication. The sales are left by the answer as so many distinct transactions. But if, in order to help the defendant to escape, we are to infer that the orders were given with implied reference to the general contract, what effect could such a reference have? Plainly only to fix the price, and for this purpose it was simply a schedule, figures on a piece of paper or in the memory of the parties, which were adopted by pointing to them in some way, as if they had been written on a blackboard. It did not matter whether the document pointed at was lawful or unlawful, as the whole business was done by the later contracts. See *Interstate Consolidated Street Ry. Co. v. Massachusetts*, 207 U. S. 79, 84, 85.

If the condition in the general agreement between the plaintiff and defendant made it bad, still it went only to that agreement and to the plaintiff's promise to sell at certain prices, not to any subsequent sales, or to the defendant's title to goods got under subsequent sales. If it had been incorporated in any way into the specific sales, it would be necessary to consider the case of *Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Co. v. Bay*, 200 U. S. 179, 185. But no such incorporation is alleged, or in any probability could have been alleged. So I think that I may assume that the parol sales were made no worse, on their face, by any reference to the content of the general agreement. And I may add that the unlawfulness of the general agreement would not make the sales bad from the outside, so to speak, if that was all that there was against them. A lawful purchase is not made unlawful merely by being the fulfillment of an unlawful contract.

It has been suggested that the plaintiff was not the real seller and only got its standing from the general agreement with the defendant, and that therefore it had to rely upon an

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illegal contract to make out its case. But the defense does not deny that the plaintiff became the owner of the goods or that the manufacturers sold in its name as the original combination provided. It is true that it says that the arrangements were made with a view of disguising the real transaction and purpose, and that really the business was to be done by the manufacturers, as I have stated. But it adds that payments were to be made to the plaintiff, and it nowhere suggest that the first contract set forth did not operate, or that the plaintiff [270] did not get the title it professed to transfer. Its illegality would not prevent the title passing. If the defendant meant to deny that it bought from the plaintiff goods which the plaintiff owned, it was very easy to deny it and to leave the plaintiff to set up the agreement if it did not join issue as it naturally would. As the defense stands, I think it means, as I have no doubt is the fact, that the technical legal title to the goods was in the plaintiff, and that the defendant purported to contract with it, the manufacturers selling in its name.

I now pass to the more remote considerations that are supposed to have a greater effect. It is said that the specific sales, the general agreement and the original combination all are steps in one illegal plan, and that the plan gives character to the whole. But we must be more precise. The plaintiff alone was party to the plan. The defendant represents itself as a victim, and says that the plan was against its rights. On what ground then does the illegal purpose of the plaintiff warrant the defendant in professing to buy its goods and then refusing to pay for them?

The plaintiff's unlawful purpose did not make it unlawful to buy the plaintiff's goods. It is decided, if decision is necessary, that a purchaser cannot escape merely on the ground that the seller is an unlawful trust. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540. *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U. S. 390, 397. I repeat that it is not alleged that the defendant in any way shared the plaintiff's intent, but to go further than I need, I will assume that it may be taken to have made the general contract with knowledge of that intent. But it can not be contended that, therefore, it was party to a transaction illegal for that rea-

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son. Whenever a party knows that he is buying from an illegal trust, and still more when he buys at a price that he thinks unreasonable but is compelled to pay in order to get the goods he needs, he knows that he is doing an act in furtherance of the unlawful purpose of the trust, which always is to get the most it can for its wares. But that knowledge makes no difference, because the policy of not [271] furthering the purposes of the trust is less important than the policy of preventing people from getting other peoples' property for nothing when they purport to be buying it. And if knowledge of the purchaser that he is furthering the purpose of the trust makes no difference, it makes no difference whether he is glad or sorry for the result. A man does not make conduct otherwise lawful unlawful simply by yearning that it should be so. In this case however the defendant was an unwilling accessory, exactly as Dee was in the *Connolly* case.

The effect of the defendant's knowledge of the plaintiff's scheme is no greater because it signed the illegal general contract. I think that I have shown that the illegality of that contract, taken by itself, did not make the specific sale illegal, and from the point of view that all that was done was a carrying out of the plaintiff's illegal scheme, it does not matter to the legality of the sales whether a particular previous step was legal or not. If knowledge that the plaintiff was attempting to monopolize, and that it sold at prices fixed in aid of the intent would not exonerate the defendant when it yielded to its necessities and bought, the same knowledge would have no greater effect if the same necessities led it to agree beforehand to do what it did.

Perhaps, in order to answer every aspect that this rambling defense presents, I ought to say in conclusion that the allegations that the price was unreasonable, and that the plaintiff threatened and had power to drive jobbers out of business that did not come into its arrangement, is not stated in such form as to make a case of duress. I think that that would have been the strongest ground on which the defense could have been put. Courts and legislation sometimes have recognized that the so-called freedom to contract or not may be made illusory by the economic situation of one of the parties.

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*Schlemmer v. Buffalo, Rochester & Pittsburg Ry. Co.*, 205 U. S. 1, 12. It would be extending the recognition further than it yet has been extended, so far as I am aware, to apply it to a case like this. But I express no opinion upon its possible ap[272]plication because, as I have said, the allegations are not directed to that end, and do not sufficiently show that the specific purchases were induced by fear. Moreover, as such duress, like fraud, goes only to motives, *The Elisa Lines*, 199 U. S. 119, 131, if the frightened or defrauded party would rescind he must restore the consideration, or at least be ready to pay the reasonable price, of neither of which is there any hint.

I think that this decision must mean that *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, ought to have been decided the other way. There, as here, there was, or was assumed to be, an illegal trust. In furtherance of the purposes of the trust a general agreement was made between the trust and the defendants, the purchasers, which required defendants to buy from the plaintiff alone at prices alleged to be unreasonable, they receiving a rebate upon that consideration, and which fixed a price at which the defendants would sell. There was just as much of a scheme and just the same scheme in that case as in this. In both the defendants cooperated as victims to the monopoly in precisely the same way. The facts spoke for themselves, and were the same. Nothing is added to the case by calling the arrangements set forth a scheme, but similar language was used in the former case, as appears from the record. The contract will be found in the same record. It was assigned as error and argued that the Circuit Court ruled that the said contract, again set forth, was not void. For these reasons I feel compelled to dissent from the judgment of the court. I am authorized to say that Mr. Justice BREWER, Mr. Justice WHITE and Mr. Justice PECKHAM concur in this dissent.

Mr. Justice BREWER, dissenting.

Concurring in the views expressed by Mr. Justice Holmes, it seems to me another matter is worthy of consideration.

The transactions between the plaintiff and defendant were, as held by the court, in violation of the Anti-Trust Act, 26 [273] Stat. 209. That act defines the rights and liabilities

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of the parties. The first three sections prohibit contracts and combinations in restraint of trade and monopolies; declare a person violating the provisions of these sections guilty of a misdemeanor and prescribe the punishment. Section 4 gives power to the Circuit Courts of the United States to prevent and restrain violations of the act. Section 6 provides for a forfeiture of property owned under any contract or combination or pursuant to any conspiracy, and seized while in course of transportation. Section 7 declares that any person injured in his business or property by reason of anything forbidden or declared to be unlawful in the act may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three-fold damages by him sustained.

The present case comes within the proposition that "where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes." *Farmers & Mechanics' National Bank v. Dearing*, 91 U. S. 29, 35; *Barnet v. National Bank*, 98 U. S. 555. These two cases arose under the National Banking Act of June 3, 1864, c. 106, 13 Stat. 99, and allustrate the doctrine referred to. That act prescribed the rate of interest which might be taken by national banks, and added that knowing and receiving a greater rate of interest should forfeit the entire interest; or if the interest had been paid, that the person paying might recover in an action of debt twice the amount of interest thus paid. These cases held that relief for a violation of the statute was a forfeiture of the interest due and not paid, or in case the interest had been paid an action of debt to recover double the amount paid. See also *Oates v. National Bank*, 100 U. S. 239.

In *Stephens v. Monongahela Bank*, 111 U. S. 197, it was decided that the remedy prescribed by the statute was exclusive. In *Driesbach v. National Bank*, 104 U. S. 52, it was held that usurious interest paid a national bank on renewing a series of [274] notes could not in an action by the bank

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on the last of them be applied in satisfaction of the principal of the debt.

Now, the remedies given in the Anti-Trust Act are three in number: First, a criminal prosecution; second, a forfeiture of property; and, third an action by any person injured to recover threefold the damages by him sustained. These being the remedies prescribed, are exclusive. The defendant sought neither of these remedies. It was not so anxious for the public welfare as to make complaint and secure criminal proceedings. There was no property to be forfeited. It did not seek to recover threefold the damage it had sustained, but only to avoid paying for the property it had purchased. The reason therefor is suggested in the opinion of the Circuit Court of Appeals, 148 Fed. Rep. 950:

"The averment that they paid 50 per cent more for their gross purchases in consequence of the illegal combination has little merit in it, moral or otherwise. They doubtless sold again at the great minimum profit they agreed to exact from retailers, and the retailers later exacted the undue profit from the consuming public."

Something of the same idea of the exclusiveness of a statutory remedy finds expression in *Texas & Pacific Railway Company v. Abilene Cotton Oil Company*, 204 U. S. 426, in which it was held that a carrier could not maintain an action at common law for excessive and unreasonable freight charges exacted on interstate shipments, where the rates charged were those which had been duly fixed by the carrier according to the interstate commerce act, and had not been found to be unreasonable by the Interstate Commerce Commission, and this notwithstanding the provision in section 22 of the act to regulate interstate commerce:

"Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

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[742] UNITED STATES *v.* NEW YORK, N. H. & H. R.  
CO. ET. AL.

(Circuit Court, D. Massachusetts. December 4, 1906.)

[165 Fed. Rep., 742.]

CONSTITUTIONAL LAW (§ 209)—"DUE PROCESS OF LAW"—"EQUAL PROTECTION OF LAWS."—There is a substantial distinction between the fifth amendment of the federal Constitution, which is obligatory

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only on the United States, and secures due process of law, and the fourteenth amendment, which is obligatory on the states and prohibits the denial of the equal protection of the laws; the latter expression being broader than the former, though the mere denial of equal protection of the laws may run into the other limitation. Mere discrimination, however, does not necessarily have that effect.\*

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 678, 727; Dec. Dig. § 209.]

For other definitions, see Words and Phrases, vol. 8, pp. 2227–2256, 2423–2426; vol. 8, p. 7644.]

CONSTITUTIONAL LAW (§ 314)—COURTS—ESTABLISHMENT—DUE PROCESS OF LAW.—Act Cong. Feb. 11, 1903, c. 544, 32 Stat. 823 (U. S. Comp. St. Supp. 1907, p. 951), providing that in any equity suit, in any federal Circuit Court, to protect trade and commerce against unlawful restraints and monopolies, the Attorney General may file a certificate of importance, whereupon the case shall be given precedence, and shall be heard by not [748] less than three Circuit Judges, or, if there are only two Circuit Judges in the circuit, then before them and such District Judge as they select, though discriminatory, is not unconstitutional.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 934; Dec. Dig. § 314.]

CONSTITUTIONAL LAW (§ 251)—DUE PROCESS OF LAW.

“Due process of law” does not prohibit the establishment of special commissions or the assignment of special judges for the trial of a specific offender, so long as there is a compliance otherwise with the rules of the common law.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 251.]

CONSTITUTIONAL LAW (§ 251\*)—“DUE PROCESS OF LAW”—“LAW OF THE LAND.”

The expressions “due process of law” and “the law of the land” are synonymous.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 732; Dec. Dig. § 251.]

For other definitions, see Words and Phrases, vol. 8, pp. 7701, 7702.]

In equity.

*Asa. P. French*, U. S. Atty., and *Wade H. Ellis*, Asst. Atty. Gen., for the United States.

*Henry W. Beal*, for defendants, New York, N. H. & H. R. Co., Consolidated Ry. Co., and Providence Securities Co.

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*Coolidge & Hight* and *Edgar T. Rich*, for defendant  
Boston & M. R. R.

*F. A. Farnham*, for defendant Providence Securities Co.

*J. H. Benton*, for defendants New York, N. H. & H. R.  
Co. and Providence Securities Co.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

PUTNAM, Circuit Judge.

This is a bill filed by the United States by virtue of the provisions of the act approved July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), commonly known as the "Sherman" or "Anti-Trust Act," and perhaps of statutes in amendment thereof. After the bill had been filed and the subpoena issued, and certain demurrers and pleas filed by the whole or a portion of the respondents, and on October 1, 1908, the Attorney General filed the following certificate:

"In the Circuit Court of the United States for the District of Massachusetts.

"No. 483, In Equity.

"The United States, Petitioner, v. The New York, New Haven and Hartford Railroad Company et al.

"I hereby certify that, in my opinion, the above-entitled case is of general public importance, and request that the same be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day before not less than three Circuit Judges of the First Judicial Circuit.

[Signed]

CHARLES J. BONAPARTE,

"Attorney General of the United States."

[744] Thereupon, and with sufficient promptness, to wit, on October 20, 1908, the respondents filed the following paper, namely:

(Circuit Court of the United States for the District of Massachusetts.)

No. 483.—In Equity.

*The United States of America*, complainant, v. *The New York, New Haven and Hartford Railroad Company*, and others, defendants.

(Objection to hearing this case "before not less than three Circuit Judges of the First Judicial Circuit," as requested by the Attorney General of the United States.)



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"The defendants object to the hearing of this case 'before not less than three Circuit Judges of the First Judicial Circuit,' as requested by the Attorney General of the United States in his certificate filed October 1, 1908, for the following, among other, reasons:

"First. Because such three judges sitting for the hearing of this case, as thus requested, will not be an inferior court ordained and established by the Congress of the United States, within the meaning of the Constitution of the United States, and especially within the meaning of section 1, art. 3, Constitution of the United States.

"Second. Because it is not competent for Congress under the provisions of the Constitution of the United States to authorize the hearing and determination of this cause by three Circuit Judges in the manner requested by the Attorney General in his said certificate.

"Third. Because the three Circuit Judges who are requested by the Attorney General to hear and determine this cause have no jurisdiction thus to hear and determine it.

"Fourth. Because this cause being brought and now pending in the Circuit Court of the United States, and the parties being by proper pleadings at issue therein, the same can not be transferred to the jurisdiction of three Circuit Judges and be by them tried as a special tribunal upon the discretionary request of the Attorney General of the United States."

The proceedings with reference to determining the jurisdiction and organization of the courts of the United States are so simple and informal that we need not consider at all whether there is any particular method by which the respondents should raise the propositions which the paper copies seeks to raise, beyond stating that there is no question that none of the issues have been waived, or lost, either by express or implied estoppel, or otherwise.

The statute by virtue of which this certificate of the Attorney General was filed, namely, section 1 of the act of February 11, 1903, c. 544, 32 Stat. 823 (U. S. Comp. St. Supp. 1907, p. 951), reads as follows:

"That in any suit in equity pending or hereafter brought in any Circuit Court of the United States under the act entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety, 'An act to regulate commerce,' approved February 4, eighteen hundred and eighty-seven, or any other acts having a like purpose that hereafter may be enacted, wherein the United States is complainant, the Attorney General may file with the clerk of such court a certificate that, in his opinion, the case is one of general public importance, a copy of which shall be immediately furnished by such clerk to each of the Circuit Judges of the circuit in which the case is pending. Thereupon

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such case shall be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day, before not less than three of the Circuit Judges of said circuit, if there be three or more; and if there be not more than two Circuit Judges, then before them and such District Judge as they may select. In the event the judges sitting in such case shall be divided in opinion, the case shall be certified to the Supreme [745] Court for review in like manner as if taken there by appeal as hereinafter provided."

In order that the issues may be understood, we will state that the respondents do not maintain that a statute having a general application, providing that for certain purposes the Circuit Court may sit with three judges, would be invalid. Their proposition is that the statute in question is so framed that it is limited to a particular class of cases, and operative only at the request of the United States, and can never be called on by a respondent, and never by either party in suits brought by others than the United States. There can be no question that this makes an apparent discrimination, yet we are unable to perceive that it is injurious to the respondents, or any other possible respondents, in any legal sense of the word. The interests involved under the Sherman Anti-Trust Act and its amendments are liable to include exceedingly extensive pecuniary values; and the possible remedies given thereby, which combine, with the rest, the powers, express or implied, of issuing injunctions, and of appointing receivers, and declaring forfeitures, all relating to vast properties, are of so radical a character that a hasty or inapt administration of the statute by a single judge might inevitably embarrass industries as wide as the continent, and even practically destroy them, before an appellate tribunal could be reached. Therefore, we say the statute under which the Attorney General filed his certificate is not injurious, because, on the whole, when availed of, it operates for the protection of the interests of respondents more than for those of the United States. From the standpoint of the substantial effect of the statute, the only complaint that could apparently be made is that it is meritorious, but does not go so far as it might. Nevertheless, in the eyes of the law, when legislation is discriminatory, if it is both discriminatory and unconstitutional, it is the right of parties litigant to determine for themselves what their interests are, and object to it if they see fit so to do.

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It certainly can not be maintained that the statute under which the Attorney General acted is unconstitutional merely because it is discriminatory. We can find neither in the Constitution, nor in the fundamental principles which underlie free government where the English language is spoken, any inhibition on Congress with reference to the matter now before us, unless it be in that part of the fifth amendment which secures "due process of law." Even if there were any constitutional provision applying to Congress like the fourteenth amendment, which in terms prohibited the United States from denying "the equal protection of the laws," nevertheless, even then it would follow that there might be legislation discriminatory on its face, yet constitutional because of the broad rules which have been admitted by the Supreme Court with reference to legislation sustainable by reason of classification. It is, however, necessary to observe the substantial distinction between the fifth amendment, which is obligatory only on the United States, and the fourteenth amendment, which is obligatory only on the states. The limitation in the former is "without due process of law." In the fourteenth amendment this limitation is accompanied with a prohibition of the denial of the "equal protection of the laws." Of course, the latter expression is broader than the former, although it must be [746] conceded that the mere denial of the "equal protection of the laws" might run into the other limitation. It is plain, nevertheless, that mere discrimination in certain particulars does not necessarily have this effect. "Due process of law," as understood when the Constitution was adopted, did not prohibit the establishment of special commissions or the assignment of special judges for trying specific offenders so long as there was compliance otherwise with the rules of the common law. Neither does it always entitle persons claiming mere civil rights to adjudications by strictly judicial tribunals. This was established as early as *Murray's Lessee v. Hoboken Land Improvement Company*, 18 How. 272, 15 L. Ed. 372, and indeed earlier, followed by *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616, *Turpin v. Lemon*, 187 U. S. 51, and, finally, by the extreme case of *United States v. Ju Toy*, 198 U. S. 253,

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25 Sup. Ct. 644, 49 L. Ed. 1040. There are still other decisions of the Supreme Court of the same class, which, with those cited, show that the expression "due process of law" may cover a great variety of tribunals, judicial and quasi judicial. So it is clear that there may be a great variety of methods of procedure. Nevertheless, that there is somewhere a limitation is brought out in a marked way by a citation from Mr. Justice Catron of expressions used by him when sitting in the Supreme Court of Tennessee, and, of course, before the adoption of the fourteenth amendment, and approved in *Cotting v. Kansas City Stockyards Company* 183 U. S. 79, 105, 22 Sup. Ct. 30, 41, 46 L. Ed. 92, as follows:

"Every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community who made the law by another."

Of course, there is a middle ground, which it may not always be easy to find, because there may be, as intimated in the quotation from Mr. Justice Catron, circumstances under which what appears to be in form a mere change of procedure would in fact discriminate in a manner which did direct justice, or which operated in an injurious way to burden or obstruct the obtaining of justice by a particular individual or corporation. Yet, in the fourth edition of Story on the Constitution, in the sections added to cover the late amendments, the language of Mr. Webster was quoted as follows:

"By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society."

It is settled that the expressions "due process of law" and "the law of the land" go strictly hand in hand. We understand this quotation from Mr. Webster appeared first in section 1944 of the fourth edition of Mr. Justice Story's work, and that this section was drafted by Judge Cooley, who knew as well as any one what was fit language for this

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purpose. We can safely adopt it for the purposes of this case.

In *Twining v. New Jersey* (in an opinion announced November 9, 1908), 28 Sup. Ct. 14, 53 L. Ed. 97, [211 U. S. 78] Mr. Justice Moody has considered [747] thoroughly, from both historical and legal points, the meaning of the expression "due process of law"; but we have no occasion for this case to quote from him.

Following out the limitations expressed by Mr. Webster pro and con, whatever might be said if the special organization of the court required by the statute here discriminated against the respondents, or other individuals or corporations situated in a similar condition, to such an extent, or in such way, as to be injurious in the eye of the law, or as to burden the defense thus injuriously, it might well be regarded as such a denial of equality that it would amount in a constitutional sense to a denial of "due process of law." As, however we can see nothing here of this nature but in lieu thereof as we have already said, a partial, if not complete, protection to all concerned against hasty or indiscreet judgments of courts consisting of a single judge, we can find nothing which, in a constitutional sense, distinguishes this from the ordinary class of legislation by virtue of which federal courts may be held by one or two judges, or even by judges out of the district.

Coming to authorities bearing more directly on the situation before us, we call attention to *Cincinnati Street Railway Company v. Snell*, 193 U. S. 30, 24 Sup. Ct. 319, 48 L. Ed. 604, which seems to be so strictly analogous to the case at bar that we are unable to distinguish them so far as any substantial question is concerned. The case arose under the fourteenth amendment, broader in its limitations than the fifth amendment, and yet it involved a discrimination of precisely the character which we have here. There, as explained at pages 33 and 34 of 193 U. S., at page 821 of 24 Sup. Ct. (48 L. Ed. 604), the statute provided that the venue might be changed on the mere motion of the plaintiff in a suit against a corporation, accompanied with a purely ex parte affidavit of five persons residing in the county, while the corporation had no corresponding right, and no corre-

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sponding right existed in behalf of any plaintiff in any suit against individuals. The constitutionality of the law was sustained, and several cases cited as furnishing analogies which we need not explain in detail. It seems impossible here to escape the conclusions of the principal case, or like conclusions in *United States v. Union Pacific Railroad Company*, 98 U. S. 569, 25 L. Ed. 143, where there were very sweeping provisions for the exercise of a peculiar jurisdiction, limited entirely to that particular suit. The legislation was sustained, and, at page 607 of 98 U. S. (25 L. Ed. 143), the following is found in the opinion:

"But whatever be the relief asked, it could only, by the express terms of the act, be granted to that party who was in equity thereunto entitled. It is very plain that there was here no new right established, no new cause of equitable relief, no new rule for determining what were the rights of the parties. That was to be decided by the principles of equity, not new principles of equity, but the existing principles of equitable jurisprudence."

This was not in any sense a dictum, but it was necessary to the decision of the case, which seems to us to fully sustain the statute in question here, so far as it is now before us.

Some propositions made by the respondents can only be accepted as maintaining that the statute before us in effect covers an attempt to create a special court. This would not necessarily raise any question [748] as to "due process of law," because, as we have said, special courts were everywhere known under the common law of England; yet it would, of course, involve a peculiar question arising solely under the Constitution of the United States—that of the power of Congress to establish a special court for a particular case or a particular class of cases. If this proposition is now insisted on, it is decided against the respondents by *In re Claasen*, 140 U. S. 200, 11 Sup. Ct. 735, 35 L. Ed. 409, wherein was brought in question the constitutionality of a statute providing that the Circuit Court for the Southern District of New York might be held by three judges for the purpose of determining criminal cases. If the present statute creates a special tribunal, so did that statute; and there is no fundamental difference between the nature of the legislation so far as that particular topic is concerned. We

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find no word in the statute indicating such an intention here. We are clear in reference to this point.

On the whole, while the legislation is apparently discriminatory, it seems plain to us that it does not contravene any provision of the Constitution of the United States limiting the powers of Congress, and especially that it does not in any way deprive the respondents of "due process of law."

The attorneys for the United States have cited to us several cases where a certificate has been filed by the Attorney General like that before us, and in which three or more judges have sat as provided in the statute under investigation. The most important of them all was *Northern Securities Company v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679. This case was one involving vast interests, and was argued by very eminent counsel, including Mr. Attorney General Knox in person. In none was there any suggestion of any difficulty like that now brought to our attention. It is true that this could hardly be regarded as an authoritative fact, because no issue was made in reference thereto; but it enables us to rest more easily on the conclusion which we have reached.

The court having considered the certificate of the Attorney General filed on October 1, 1908, and the suggestions of the respondents in reference thereto, filed on October 29, 1908:

It is ordered that this case proceed in accordance with the certificate of the Attorney General, filed on October 1, 1908, pursuant to the first section of chapter 544 of the act approved on February 11, 1903, so far as that statute relates to the personality and the number of the judges to sit therein.

NOTE BY THE COURT.—While this opinion was in preparation the decision of the Circuit Court for the Third Circuit in *United States v. Delaware & H. Co.*, 164 Fed. 215, came to hand. This decision related to several cases which were proceedings by the United States, under the so-called "commodities clause" of the interstate commerce statutes, against the various coal-carrying railroads in Pennsylvania. Three Circuit Judges sat—namely, Dallas, Gray, and Buffington—and a statement made by Judge Gray in his opinion in behalf of the court illustrates in a striking manner the vast interests which may be involved in this class of litigation, and the

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great detriment which [749] would come, not only to corporate property, but to the public at large, by an inapt decision, and particularly the reason for a requirement that Congress should give to respondents in proceedings by the United States a like right of demanding a conservative tribunal of three judges which is now given to the Attorney General. The opinion, at page 225 of 164 Fed., said as follows:

"It results, therefore, that the coal described in the foregoing categories is outlawed in interstate commerce, and must remain so, unless the defendants can divest themselves of all title or interest in the coal, coal lands, or coal companies from which the markets in other states have been so largely supplied. The enforcement of the act must, of necessity, result, either in the defendants holding their coal properties and refraining from transporting coal to other states, and confining themselves to the mining of such coal as may be used in the State of Pennsylvania, or in their divesting themselves of all title or interest, direct or indirect, in said properties, by sale or surrender thereof, as they may be able to accomplish the same. The population of the region, outside of Pennsylvania, absolutely dependent upon the use of anthracite coal for domestic or industrial purposes, is very large, and has been, no doubt moderately, estimated at from 12,000,000 to 15,000,000. The adoption of the former alternative, therefore, would entail, while it continued, an amount of suffering and deprivation that it is hard to forecast or appreciate, while the forced resort to the other would necessarily inflict upon the defendants and their stockholders a most disastrous sacrifice and pecuniary loss."

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[774] MONARCH TOBACCO WORKS *v.* AMERICAN TOBACCO CO. ET AL.

(Circuit Court, W. D. Kentucky, December 21, 1908.)

[165 Fed. Rep., 774.]

MONOPOLIES (§ 12)—INTERSTATE TRADE—STATUTES.—Act Cong. July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, is illegal, and every person who shall make any such contract, or engage in any such conspiracy, etc., on conviction shall be fined. Section 2 declares that every person who shall monopolize, or attempt to monopolize, or combine or conspire to monopolize, any part of the interstate trade or commerce, on conviction shall be punished, etc. *Held*, that such sections referred to and made illegal two different



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things: Section 1, combinations in restraint of interstate trade and commerce; and section 2, combinations or conspiracies to monopolize, or to attempt to monopolize, interstate trade and commerce.\*

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

**MONOPOLIES (§ 23)—PRIVATE INJURIES—ACTION.**—Act Cong. July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), declares that any person who shall be injured in his business or property by any other person, or corporation, by anything forbidden or declared to be unlawful by the act which prohibits combinations in restraint of interstate trade and commerce, and combinations or conspiracies to monopolize, etc., may sue therefor in any federal court in which the defendant resides or is found, and may recover threefold damages, etc. *Held*, that it is only necessary to support an action under such section that complainant's business or property has been in some way injured by reason of defendant's illegal scheme.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 16; Dec. Dig. § 23.]

**MONOPOLIES (§ 28)—CONSPIRACIES TO MONOPOLIZE INTERSTATE COMMERCE—RES INTER ALIAS ACTA.**—In an action for damages to plaintiff by defendant's alleged combination to monopolize or attempt to monopolize interstate commerce in tobacco, in violation of Act Cong. July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3200), prohibiting conspiracies to monopolize or attempts to monopolize interstate commerce, defendant's acts and conduct prior to plaintiff's organization and entering the business were immaterial as *res inter alios acta*.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.]

**MONOPOLIES (§ 28)—CONSPIRACY TO MONOPOLIZE—CIVIL DAMAGES—PETITION—CONSTRUCTION.**—Act Cong. July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), prohibits combinations in restraint of interstate trade and commerce, and section 2 prohibits conspiracies to monopolize or attempts to monopolize interstate trade and commerce. Section 7 provides that any person injured by a violation of either section may sue for and recover treble damages. *Held* that, in an action brought for such damages in a [775] federal court sitting in Kentucky, it was not necessary that the petition should state the facts showing a right of action with the particularity of an indictment, but that it was sufficient if the facts constituting a cause of action were stated as concisely as possible consistent with clearness, as required by Civ. Code Prac. Ky. §§ 90, 115.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.]

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**MONOPOLIES (§ 28)—COMBINATION OF MONOPOLIES—DAMAGES.**—Where, as a result of conspiracy or combination in restraint of interstate commerce, prohibited by Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), a person is injured by being compelled to pay a higher price for any article affected thereby than he would otherwise be compelled to pay, he may recover treble the amount of the damages sustained.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.]

**MONOPOLIES (§ 24)—UNLAWFUL COMBINATIONS—RESTRAINT OF TRADE—INJUNCTION.**—Combinations may be enjoined if the objects of the association are such as to violate Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), prohibiting combinations in restraint of interstate commerce, and combinations and conspiracies to monopolize interstate commerce.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.]

**MONOPOLIES (§ 14)—COMBINATIONS—MANUFACTURE OF ARTICLE OF NECESSITY.**—A combination, the sole object of which is to manufacture an article of common necessity, is not, without more, a violation of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), prohibiting combinations in restraint of interstate commerce.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 11; Dec. Dig. § 14.]

**MONOPOLIES (§ 12)—CONSPIRACIES IN RESTRAINT OF TRADE—SEPARATE ACTS.**—A combination or conspiracy to monopolize or attempt to monopolize interstate commerce, in violation of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), was not immune because it was carried into effect by a series of separate acts, each one of which taken alone, was not objectionable, where the direct object and result of all was the perfection of a combination agreement whereby the free flow of commerce between the states, or the liberty of the trader, was obstructed.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

**MONOPOLIES (§ 12)—INTERSTATE COMMERCE—RESTRAINT—EXTENT.**—It is not necessary that restraint of interstate trade and commerce should be so complete as to amount to total destruction in order to constitute a violation of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), prohibiting combinations and conspiracies in restraint of interstate trade and commerce, or to monopolize or attempt to monopolize the same.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

**MONOPOLIES (§ 28)—CIVIL DAMAGES—PARTIES.**—Where a complaint for conspiracy to monopolize interstate trade and commerce charged

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all the defendants jointly with having entered each of the alleged combinations and conspiracies complained of, and all the acts were alleged to have been done pursuant to a common design, plain-[776] tiff was not required to elect because some of the defendants were charged with doing one act and others with another.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.]

**DAMAGES (§142)—PLEADING—SPECIFICATION.**—Civ. Code Prac. Ky. § 134, provides that, if the allegations of the petition are so indefinite or uncertain that the precise nature of the claim does not appear, the court may require that it be made more definite and certain by amendment. *Held*, that under the conformity act (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]) a petition for treble damages to plaintiff because of defendants' alleged unlawful combination or conspiracy to monopolize interstate commerce in violation of Act. Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), sufficiently charged general damages by an allegation that, by virtue of defendant's alleged unlawful acts, plaintiff had sustained damages in the sum of \$500,000.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 418; Dec. Dig. § 142.]

*Helm Bruce and O'Neal and O'Neal* for plaintiffs.

*Gibson, Marshall and Gibson*, for American Tobacco Co.

*Carroll and Middleton*, for Nall & Williams Tobacco Co.

*Humphrey, Davie and Humphrey*, for Mengel Box Co.

EVANS, District Judge.

An act to protect trade and commerce against unlawful restraints and monopolies, approved July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), provides as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

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"Sec. 2. Every person who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

It will be seen that section 1 makes every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, illegal; and that section 2 provides that every person who shall monopolize or attempt to monopolize, or combine or conspire with any person or persons to monopolize, any part of the trade or commerce among the several states, shall be deemed guilty of a misdemeanor. It is obvious that the two sections refer[777]red to make illegal two different, though nearly allied, things, namely, section 1 refers to combinations in restraint of interstate trade and commerce, and section 2 refers to combinations or conspiracies to monopolize, or to attempt to monopolize, interstate trade and commerce. Prima facie these two sections deal with the criminal features of certain conduct, but section 7 gives a right of action for the recovery of damages to any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared by the act to be unlawful. The language of each of the three sections is very general, that of the seventh section in no wise detailing or limiting in terms the character of injuries for which a right to sue is given. All that is necessary to support the action is that the business or property of the plaintiff shall have been in some way injured by reason of the illegal scheme.

The petition shows that the plaintiff is a corporation which was organized in 1901, and that by the coming in of the year 1903, by the expenditure of large sums of money, it had laid

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the foundation for, and in fact had built up, a good trade in tobacco, which it was then selling in large quantities. The petition also contains a long, general statement as to how the defendant, the American Tobacco Company, had theretofore built itself up into a gigantic corporation with immense capital, and makes evident the fact that this was done by a series of acts and a course of conduct with which its co-defendants had nothing to do, and in which the plaintiff could not have had an interest, it not then being in existence. Indeed, the pleading makes manifest the fact that such acts and conduct on the part of the American Tobacco Company were *res inter alios acta*. Passing all such averments by as not material nor pertinent to any cause of action in plaintiff's favor, which must depend upon the combination of the defendants, we come to those allegations of the petition which bear upon the complaint made against them and growing out of their conduct in coöperation one with the other. Stated generally, the pleading avers that after plaintiff had been organized in 1901, and had, as we have indicated, by 1903 built up a fairly good trade, the defendants combined and conspired with each other, and with various other persons unknown, in the form of a trust or otherwise to restrain trade and commerce in tobacco among the several states; and, further, that the defendants combined and conspired to monopolize, and have attempted to monopolize, trade and commerce in tobacco among the several states. Such are the charges of the plaintiff against the defendant, and in general terms they come within the language of sections 1 and 2 of the act. The petition then undertakes to specify the acts of the defendants, whereby it sustained the injuries complained of. It is alleged that in 1903 the American Tobacco Company acquired control of the Nall & Williams Tobacco Company by purchasing a large majority of its capital stock, which fact it kept secret; that the Nall & Williams Tobacco Company had theretofore been an independent concern hostile to the American Tobacco Company; and that by falsely pretending that the Nall & Williams Tobacco Company remained independent, and by other means set forth, the defendants carried out and put into operation the conspiracies and combinations alleged in the

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petition, and competed under false pre- [778] tenses with plaintiff in Indianapolis, Ind., in Minneapolis, Minn., in Cumberland, Md., and in Louisville, Ky., greatly to plaintiff's injury. Some details of these transactions in the cities named are set forth in the petition, and it is also averred that the defendant the Mengel Box Company was a party to the combinations and conspiracies referred to; that it had a contract to furnish the plaintiff with boxes for all the tobacco it put up, and that the contract contained a stipulation whereby the Mengel Box Company agreed to keep entirely secret its transactions with the plaintiff and the number of boxes plaintiff purchased, but that in order to carry out the alleged combinations and conspiracies, and to put them into operative effect, the American Tobacco Company acquired a controlling interest in the Mengel Box Company, exposed plaintiff's said secret, and, having acquired knowledge of plaintiff's affairs in this way, was enabled to materially aid in carrying into effect the conspiracies and combinations of which the plaintiff complains. The plaintiff then avers that "by the aforesaid unlawful acts of defendants, and those conspiring and combining with them, plaintiff has been injured in its business and property, and has thereby sustained damages in the sum of five hundred thousand dollars." The prayer of the petition is for the recovery against the three defendants of three times the amount of the alleged damages, namely, \$1,500,000, and the costs of the suit, including a reasonable attorney's fee.

Each of the defendants has filed a general demurrer to the petition; each of them, in one form or another, has moved the court to require the plaintiff to make its allegations of "damages" more definite and certain; and the American Tobacco Company and the Mengel Box Company, insisting that two separate causes of action not affecting all of the parties defendant are set up in the petition, have, under section 83 of the Civil Code of Practice of Kentucky, moved the court to require the plaintiff to elect whether it will prosecute the action against the American Tobacco Company and the Nall & Williams Tobacco Company alone, or whether it will prosecute it against the American Tobacco Company and the Mengel Box Company alone.

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## THE DEMURRERS.

The general demurrers to the petition raise an important and interesting question, as to which, after very careful consideration, the court has not been able altogether to free itself from doubt. It goes without saying that the act should be so construed as to effectuate the purposes for which it was enacted, but the language of section 7 is very brief and very general, prescribing no limits, except the broad one that the suits it authorizes shall be for injuries which have been suffered by any person in his business or property at the hands of any person or corporation by reason of anything forbidden or declared to be unlawful by the act. As applied to this case, the statutory factors of the right to recover may be stated to be: First, that there has been a combination and conspiracy to restrain interstate trade and commerce in tobacco; second, that there has been a combination and conspiracy to monopolize, or at least to attempt to monopolize, interstate trade and commerce in tobacco; and, third, that, by reason of one or the other, or both, [779] of these combinations or conspiracies, the plaintiff has been injured in its business and property.

At the outset it is urged that the petition, which, it is contended, is based upon a highly penal statute, should state the facts showing a right of action with all the fullness and particularity required in an indictment charging a criminal offense. If the pecuniary penalties prescribed for any violation of the act could be recovered by the United States in a civil action instead of by indictment, as Congress might have enacted, there would be plausibility in the contention, for sections 1 and 2 are expressly penal, but it cannot be conceded that section 7 is penal in any such sense as to support the argument. It gives any individual the right to a civil action for certain injuries he may sustain, and this, like other civil actions, as to the pleadings therein, must be governed by the provisions of the Civil Code of Practice of Kentucky when the suit is brought here; and those provisions demand, not that the rules of pleading in criminal cases shall be observed, but sections 115 and 90 of the Code require that

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the petition must, in language "as concise as possible consistently with clearness," state "facts which constitute a cause of action." By this rule the pleading in this case must be tested.

The statute has many times been before the courts, and certain questions have been definitely settled. It has been adjudged that where, as the result of such combinations as the act makes unlawful, one is injured by being compelled to pay a higher price for any article affected thereby, he may recover triple the amount of the damages sustained. *Chattanooga Foundry v. Atlanta*, 203 U. S. 390, 27 Sup. Ct. 65, 51 L. Ed. 241. See, also, *Montague & Co. v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608. It has been settled that combinations may be enjoined by a court of equity if the objects of the association be such as violate the provisions of the act. *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518. If, however, the sole object of the combination be to manufacture an article of common necessity, it has been held that that of itself is not interstate commerce, and that the act is not thereby violated. *United States v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325. If useful, we might refer to many other cases, but for the present we content ourselves with the summary of them made by the Chief Justice in *Loewe v. Lawlor*, 208 U. S., at page 293, 28 Sup. Ct. 301, at page 303, 52 L. Ed. 488, when, in delivering the opinion of the court upholding the complaint in that case, he said that the conclusion rested "on many judgments of this court to the effect that the act prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the states, or obstructs in that regard the liberty of a trader to engage in business."

The demurrer admits as true the averments of the petition, which, in the language of the act, show the existence of just such combinations and conspiracies as the act condemns. The demurrer must, therefore, be overruled unless the specified details of the acts by which the objects of the combinations and conspiracies were carried into effect obviate or destroy the force and effect of the admitted existence of the com-



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binations themselves. The effect of this proposition, if [780] sound, would be that the illegal conspiracies and combinations which were entered into by the defendants gave the plaintiff no cause of action, because, though they were in fact carried into effect, it was done by a series of separate acts, each one of which, when taken alone, was within the rights of the defendant. That this, while plausible, is not sound, would seem to be indicated with sufficient clearness by what the Supreme Court said in *Swift & Co. v. United States*, 196 U. S., where, at page 396, 25 Sup. Ct. 279, 49 L. Ed. 518, Mr. Justice Holmes, speaking for the court, used this language:

"The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body, and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as different charges they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful, and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. *Aikens v. Wisconsin*, 195 U. S. 194, 206, 25 Sup. Ct. 3, 49 L. Ed. 154."

In *Chattanooga Foundry v. Atlanta*, 203 U. S. 397, 27 Sup. Ct. 66, 51 L. Ed. 241, the same learned justice said:

"Finally, the fact that the sale was not so connected in its terms with the unlawful combination as to be unlawful, in no way contradicts the proposition that the motives and inducements to make it were so affected by the combination as to constitute a wrong."

These views were reiterated and strongly enforced in *Loewe v. Lawlor*, 208 U. S. 298-299, 28 Sup. Ct. 301, 52 L. Ed. 488. The reasons for the rule do not seem to lie very deep, it being conceivable that the object of every such combination could, and probably would, be consummated by acts which would be perfectly lawful if not done with the design to put the unlawful scheme into successful operation. The conspiracy and combination, though themselves unlawful, cannot injure any person either in his business or property so as to give him a cause of action under section 7, unless something be done to make the combination and conspiracy effective; but whatever is done by those engaged in the scheme or plot with the motive and intent to carry

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out the unlawful purpose itself becomes tainted with the illegality of the scheme, however innocent it might otherwise have been, the separate acts becoming thereby so interwoven with the unlawful scheme as to cause the injury "by reason" of the combination, within the language of section 7. It therefore seems that a series of acts, each of which may be innocent in itself, may be wrongful if the direct object, purpose, and result thereof be to carry into effect a combination agreement whereby the free flow of commerce between the states or the liberty of a trader to carry on his business be obstructed. It may be that nothing was in fact done in either one of the four cities mentioned in the petition which related in the direct sense to interstate commerce. Yet the plaintiff was engaged in interstate commerce, and if it be true that one object of the combination was to interfere unlawfully with that business, even though it were done locally, it might give him a right of recovery for the consequent injuries. Sometimes an unlawful act may be done by means that appear to be lawful, just as a lawful [781] act may be accomplished by means that are manifestly unlawful. It must be confessed, however, that many of the material averments of the petition are expressed in somewhat vague and general terms, making it difficult to tell what are the real elements of the injuries complained of, so as to enable us definitely to say whether the infliction of those injuries was through conduct condemned by the act. It is certain that monopoly in interstate trade and commerce respecting tobacco was not made complete, and only the attempt to create the monopoly is complained of, attempt alone being also within the act. The act does not appear to require that the restraint of interstate trade and commerce shall be so complete as to amount to total destruction. Nor, indeed, would that be essential, as injury to the business or property of the plaintiff might result although the objects of the illegal combination were only partially accomplished. It was contended that it was not unlawful merely to keep one's business affairs secret, nor for one corporation to obtain a controlling interest in another, nor merely to compete with a rival for trade and by mere competition to drive him out of business,

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nor to offer better terms and inducements than a rival in business offered, and we are by no means inclined to deny either of those propositions in the abstract, for neither is in terms forbidden by the act, nor, possibly, by any moral consideration; but, as we have seen, the seventh section of the act, in most general language, provides that "any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act" shall have a right to recover therefor, and the rulings of the Supreme Court to which we have called attention seem clearly to show that even lawful acts may become agencies of wrongdoing if the motive of doing those acts be to carry into effect a combination made illegal under the statute, and particularly if doing them does in fact effectuate the purposes of the unlawful scheme.

In the case of *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689, cited for the defendants, the plaintiff sued to recover triple damages, as plaintiff has done in this case; but the conduct of the defendant in that case consisted solely of a single course of business, and the court, holding, as we construe its opinion, that that particular course of business was not unlawful, and did not of itself constitute an unlawful combination, denied the plaintiff's right to recover. If we dissect the petition in this case so far as it gives specifications of the operations of the defendants in carrying their combinations and conspiracies into effect, and look separately at each act charged, we might conclude that at least some of them were strictly within defendants' rights, and if the plaintiff at the trial shall prove the existence of the conspiracy, then what may be the result when further testimony shall fully show the exact situation, as distinguished from what we merely assume to be true on demurrer, we cannot now undertake to determine; but as the existence of the illegal combinations and conspiracies to restrain and monopolize interstate trade and commerce in tobacco is admitted by the demurrer, we have concluded that the petition states a cause of action under the statute, and that, whatever may be the case as to

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each of the sep- [782] arate lines of conduct to which the defendants resorted in the four cities named to carry such combinations and conspiracies into effect, that conduct, when taken together, may show not only how plaintiff was injured, but the motive of the defendants in doing the things complained of. The demurrers will be overruled.

## ELECTION.

We have no doubt that all the defendants are jointly charged with having entered into each of the alleged combinations and conspiracies complained of, and, while one is charged with doing one thing and one another, all of these acts, we think, are sufficiently alleged to have been done in pursuance of the common design, and for that reason the motions to require an election are overruled.

## MOTIONS TO MAKE THE PETITION MORE DEFINITE.

In one form or another each of these motions seeks to have the plaintiff's averments as to "damages" made more definite and certain. The motions in terms all relate to the "damages," as distinguished from a statement of the injury plaintiff claims to have suffered. We conceive the injury to be one thing, and the damages resulting from the injury to be another. Section 134 of the Civil Code of Practice provides that the court may at any time, in furtherance of justice, cause or permit a petition to be amended, and, if its allegations be so indefinite or uncertain that the precise nature of the claim is not apparent, the court may require the pleading to be made definite and certain by amendment; and the practice act (section 914, Rev. St. [U. S. Comp. St. 1901, p. 684]) requires the practice, pleadings, and forms and modes of proceeding in common-law actions in the federal courts to conform as near as may be to those of the state.

As already pointed out, the petition asserts that by reason of the alleged unlawful acts of the defendants it was damaged in the sum of \$500,000, and these motions are made in order that plaintiff may be required to show more definitely and in more detail the elements of the "damages" said to

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have been inflicted so that the defendants can know what they are to meet. The general rule is accurately stated in Section 1001 of Bates on Federal Procedure, where it is said:

"The damages are either general or special. General damages are such as naturally arise out of, or are connected with, and which the law implies or presumes to have accrued from, the injury complained of; and special damages are such as really accrued and are not implied by law, and are either superadded to general damages arising from an act injurious in itself, or are such as arise from an act in-different and not actionable in itself, but injurious only in its consequences, and they must be specially alleged." *Tidd's Prac.* (1807) 389-400; 1 Chitty, Pl. (12th Am. Ed.) 395-399.

In Kentucky it is well settled that, if the damages claimed are such as would usually or naturally accompany or follow or be included in the results of the injuries complained of, they may be stated and claimed in general terms, but that other and further damages can neither be proved nor recovered unless expressly averred and shown. A familiar illustration of the difference between the two may be found in suits for damages for libel or slander. The damages usually or [783] naturally resulting from incriminating publications may be stated in general terms and proved at the trial; but if, in addition, the plaintiff had been prevented by the publication from obtaining or continuing to hold profitable employment, such result not usually following a slanderous or libelous statement, there must be a special averment showing the special injury, or otherwise damages therefor can neither be proved nor recovered in the action. The rule is entirely familiar that to entitle a plaintiff to prove special damages he must allege in his petition the facts causing them. Many other illustrations might be given, but we think it sufficient to say that in our opinion the damages claimed in the petition in this case are not special damages within the rules distinguishing them from those which may be supposed usually or naturally to flow from the conduct complained of. The plaintiff in a suit for damages for personal injuries, for example, is never required to give a bill of particulars or an analytical statement showing in detail how much one bone or one limb or one organ suffered, and what portion of the damages claimed should be appor-

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tioned and attributed to each, and this suggestion will serve to illustrate the idea of the court in this case as to specifying the elements of the damages claimed. The universal practice in Kentucky is to allege damages, when claimed as such, in general terms, in much the same way as was done by the plaintiff in the petition in this case, unless special damages are sought to be recovered. The Kentucky practice may be illogical and not the best or fairest way for giving the defendant notice of what he is to meet, but, being the rule in Kentucky, we must conform to it.

For these reasons, the motions to require the petition to be made more definite and certain as to the "damages" claimed will all be overruled.

[251] THOMSEN ET AL. v. UNION CASTLE MAIL  
S. S. CO. ET AL.\*

(Circuit Court of Appeals, Second Circuit. October 1, 1908.)

[166 Fed. Rep., 251.]

**APPEAL AND ERROR (§ 927)—DISMISSAL—REVIEW.**—In reviewing a judgment dismissing plaintiffs' complaint over their objection before plaintiffs' testimony had closed, it must be assumed that plaintiffs, if permitted to proceed, would have established that which they alleged, unless negatived by their evidence or admissions on the trial.<sup>b</sup>

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3748; Dec. Dig. § 927.]

**MONOPOLIES (§ 16)—RESTRAINT OF TRADE—FOREIGN COMMERCE—**  
"COMBINATION IN RESTRAINT OF COMPETITION."—A combination of shipowners to prevent competition between members by maintaining uniform freight rates in South African trade, and to eliminate the possibility of competition with other lines by requiring shippers to pay forfeit money in case they patronized other lines, constituted a combination in restraint of competition and foreign commerce, in contravention of the federal anti-trust statute.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. § 16.

For other definitions, see Words and Phrases, vol. 2, p. 1275; vol. 8, p. 7606.]

\* For opinion of Circuit Court (149 Fed. Rep., 933) see *ante*, p. 108.

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**MONOPOLIES (§ 12)—RESTRAINT OF TRADE—REASONABLENESS.**—In an action to recover treble damages caused by an unlawful combination in restraint of foreign commerce, in violation of the federal anti- [252] trust statute, whether the restraint of trade caused by the combination was reasonable or unreasonable was immaterial.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

**MONOPOLIES (§ 12)—RESTRAINT OF FOREIGN COMMERCE—CONTINUING COMBINATIONS.**—Where a combination in restraint of foreign commerce was continuing, it was not material to plaintiff's right to recover treble damages sustained thereby, under the federal Anti-Trust Act, whether the combination was entered into before or after plaintiffs commenced business, it being equally unlawful to prevent a person from engaging in business as to drive a person out of business.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

**MONOPOLIES (§ 12)—FOREIGN COMMERCE—PLACE OF COMBINATION.**—Where a combination in restraint of foreign commerce, in violation of the federal Anti-Trust Act, was put in operation in the United States and affected her foreign commerce, it was not material to a suit by a person injured thereby that it was formed in a foreign country.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

**MONOPOLIES (§ 28)—RESTRAINT OF FOREIGN COMMERCE—COMPLAINT—DAMAGES.**—Where a complaint, under the federal Anti-Trust Act, to recover treble damages for a combination in restraint of foreign commerce, alleged that plaintiffs were coerced by defendants' unlawful combination to pay a sum in addition to a reasonable freight rate, which was held subject to forfeiture in case plaintiffs shipped by other lines or their consignees received freight by other lines, and also contained general allegations of damage, it sufficiently alleged that plaintiffs had suffered damage by a violation of the act.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.]

In Error to the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 149 Fed. 933.

*Lorenzo Ullo* (*Albert M. Yuzzolino*, of counsel), for plaintiffs in error.

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*Convers and Kirlin and Thomas Thacher (J. Parker Kirlin, of counsel), for defendants in error.*

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge.

The plaintiffs brought an action for the recovery of treble damages under the seventh section of the federal anti-trust statute. The case came to trial, and the plaintiffs put in a part of their testimony, when, over their objection, the trial court dismissed the complaint.

In determining whether there was error in this action, it must be assumed that the plaintiffs, had they been permitted to proceed, would have established that which they alleged, unless negated by their evidence or admissions upon the trial. The complaint alleges, in substance, that the defendants were engaged as carriers in the South African trade, and entered into a combination in restraint of foreign [253] trade and commerce in violation of the act by means of a scheme under which they united as "The South African Lines," fixed rates, and shut off outside competition by requiring shippers to pay a percentage in addition to a reasonable freight rate which they should receive back in case—and only in case—they refrained from shipping by other lines. The evidence shows the existence of a "conference" for the purpose of fixing and maintaining rates and a return "commission" to "loyal" shippers. The manifest purpose of the combination was to prevent competition between members by maintaining uniform rates, and to eliminate the possibility of competition with other lines by requiring shippers to pay that which was equivalent to forfeit money. The combination, being in restraint of competition in foreign commerce, was in contravention of the federal anti-trust statute. As said by the Supreme Court of the United States in *National Cotton Oil Company v. Texas*, 197 U. S. 115, 25 Sup. Ct. 379, 49 L. Ed. 689, in speaking of the purposes of the federal and state statutes against combinations:

\* "According to them, competition, not combination, should be the law of trade. If there is evil in this, it is accepted as less than that which may result from the unification of interests and the power such unification gives."



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See, also, *Northern Securities case*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679. And if there be any exception to the rule that the purpose of the statute is to preserve competition, it will not be found in a combination of carriers which not only eliminates competition among themselves, but attempts, in the manner shown in this record, to prevent outside competition.

Whether the restraint of trade imposed by the combination was reasonable or unreasonable is, under repeated decisions of the Supreme Court, immaterial. Whether the combination was entered into before or after the plaintiffs commenced to do business is equally immaterial. The statute applies to continuing combinations. It is as unlawful to prevent a person from engaging in business as it is to drive a person out of business. That the combination was formed in a foreign country is likewise immaterial. It affected the foreign commerce of this country, and was put into operation here. The complaint, therefore, states an unlawful combination—a thing “forbidden or declared to be unlawful” by the act. And the remaining question is whether the plaintiffs were thereby injured in their business or property.

The complaint alleges, in substance, that the plaintiffs were coerced by the unlawful combination into paying a sum in addition to a reasonable freight rate which was held practically subject to forfeiture in case the plaintiffs shipped by other lines or their consignees received freight by other lines. These are allegations of injuries inflicted by the combination. If the plaintiffs were coerced into paying sums of money, in excess of reasonable rates, which were held for the very purpose of preventing that competition which the statute is designed to promote, they were damaged, within the meaning of the statute, to the extent of the sums so paid. Moreover, the complaint contains general allegations of damage which we do not find to have been withdrawn upon the trial. It may be that the plaintiffs will be unable to [254] establish the essential elements of the claims for damage which they set up. But they are entitled to their opportunity—to their full day in court.

Judgment reversed.

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**[254] PENNSYLVANIA SUGAR REFINING CO. v.  
AMERICAN SUGAR REFINING CO. ET AL.\***

(Circuit Court of Appeals, Second Circuit. December 15, 1908.)

[166 Fed. Rep., 254.]

**APPEAL AND ERROR (§ 919)—REVIEW—PRESUMPTIONS.**—Where defendant's motion to dismiss the complaint for failure to state a cause of action was granted, it must be assumed on a writ of error that plaintiff, if given an opportunity, would have established the allegations of the complaint.<sup>b</sup>

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 919.]

**MONOPOLIES (§ 17)—RESTRAINT OF TRADE—STATUTES.**—If a contract in restraint of trade only affects products within the limits of the state, it is subject only to state laws, any remote or incidental effect on interstate commerce being insufficient to bring it within the federal law; but if, in addition, it attempts to control the disposition of the manufactured article across state lines, it then directly affects interstate commerce, and is within the prohibition of the federal act.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 17.]

**MONOPOLIES (§ 17)—CONSPIRACY IN RESTRAINT OF INTERSTATE COMMERCE—MONOPOLIZING MANUFACTURE AND SALE.**—Plaintiff alleged that having been engaged in the purchase of raw sugar in different states and in their transportation to Pennsylvania, where it manufactured the same into refined sugar and sold the same in interstate commerce, it suspended business during the Spanish War, and enlarged its refinery, preparing and intending to resume business, when defendants conspired to prevent it from engaging in business, and accomplished this result by inducing plaintiff's majority stockholder to accept a loan, pledging his stock as collateral with voting power, by which defendant elected new directors, who voted that plaintiff should do no business; that the object of such conspiracy was to prevent plaintiff from engaging in business in competition with defendant. *Held*, that the conspiracy alleged directly operated not alone on the manufacture of sugar within the state of Pennsylvania, but on interstate commerce in the transportation and delivery of both the raw material and the manufactured product, and was therefore within the federal Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]).

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. § 17.]

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\* For opinion of Circuit Court (160 Fed. Rep., 144) see *ante*, p. 369.

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**MONOPOLIES (§ 28)—RESTRAINT OF TRADE—INTERSTATE COMMERCE—CONTINUANCE OF BUSINESS.**—Where plaintiff, in a suit to recover treble damages under the Federal Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), alleged that plaintiff had been engaged in interstate commerce, but had temporarily ceased business and enlarged its refinery at large expense, and prepared and intended to resume business as before, but had been prevented from doing so by defendant's alleged acts, the complaint was not demurrable as showing that plaintiff was not engaged in business and had no established business to injure at the time of the conspiracy.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 28.]

**[255] MONOPOLIES (§ 28)—RESTRAINT OF TRADE—ANTI-TRUST STATUTE—COMPLAINT.**—A complaint to recover damages under the federal Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) charged that defendants combined and conspired to prevent plaintiff from engaging in business and in interstate commerce, and induced S., who was a majority stockholder in plaintiff corporation, to accept a loan from defendant company and pledge as security a majority of plaintiff's capital stock with the absolute voting power; that defendant used such power to elect directors favorable to carrying out the object of the conspiracy, which defendant did by voting that plaintiff should not engage in business—the complaint stated a conspiracy in restraint of interstate trade and commerce in violation of the act.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 28.]

**CORPORATIONS (§ 317)—CONSPIRACY—DIRECTORS.**—A corporation can not conspire that its own directors shall be unfaithful to it.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 317.]

Liability of corporation for conspiracy, see note to *Hindman v. First Nat. Bank*, 39 C. C. A. 17.]

**CORPORATIONS (§ 317)—DIRECTORS—WRONGFUL ACTS—EFFECT AS TO CORPORATIONS.**—Action of directors in the name of their corporation, detrimental to its interests and in bad faith, is, with respect to them, the act of the corporation in name only.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 317.]

**CORPORATIONS (§ 317)—MISCONDUCT OF DIRECTORS—RIGHTS OF CORPORATION—DAMAGES.**—Directors and others conspiring to obtain action by the directors against the interest of the corporation for wrongful and ulterior purposes are liable to the corporation for the damages caused thereby.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 317.]

**CORPORATIONS (§ 317)—DIRECTORS—WRONGFUL ACTS OF MAJORITY—CORPORATION IN PARI DELICTO.**—Where defendants obtained control of plaintiff corporation for the purpose of ruining it and to prevent plaintiff from ever becoming a competitor, and carried out such unlawful purpose by vote of a majority of plaintiff's stock that

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plaintiff should cease business against the protest of the minority stockholders, the corporation and defendants were not in *pari delicto*.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 317.]

In Error to the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 160 Fed. 144.

*H. Snowden Marshall* and *George H. Earle, Jr.* (*Frank S. Black, Joseph De F. Junkin, and John W. Hutchinson, Jr.*, on the brief), for plaintiff in error.

*John G. Johnson* (*Henry W. Taft*, on the brief), for defendants in error American Sugar Refining Co. and John E. Parsons.

*Howard Taylor*, for other defendants in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge.

This is an action for the recovery of treble damages under the seventh section of the federal anti-trust [256] statute (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]).

The complaint alleges, in substance, that the plaintiff, a Pennsylvania corporation, had from the year 1883 to the year 1898 been engaged in the business of importing raw sugar from other states and foreign countries into the state of Pennsylvania, manufacturing it there into refined sugar, and exporting the manufactured product to other states and countries; that the plaintiff ceased carrying on such business in 1898 on account of the Spanish War, and had not actually resumed at the time of the conspiracy complained of, but at such time had erected a new and enlarged sugar refinery upon its premises in said state of Pennsylvania, and was prepared and intended to resume and continue the business

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which it had before carried on; that the defendants conspired to prevent the plaintiff from re-engaging in business, and that they accomplished their object by inducing one Segal, who indirectly held a controlling stock interest in the plaintiff corporation, to accept a loan of a large sum of money and to turn over to them such interest, with the voting power attached thereto, which they exercised to elect new directors and caused such directors to vote that the plaintiff should do no business. The defendants answered, and the case came on for hearing, when a motion was made to dismiss the complaint upon the ground that it failed to state a cause of action. This motion was granted by the trial court.

Upon this writ of error we must assume that the plaintiff, if given the opportunity, would have established the allegations of its complaint—would have shown that it was directly engaged in importing raw sugar, refining it, and exporting the finished product; that it temporarily ceased to do business, and was prepared to resume with larger facilities, when, through the defendants' conspiracy, it was prevented from so doing.

The defendants first contend that the conspiracy stated in the complaint relates to manufacture—to production—and, consequently, does not directly restrain interstate commerce, in violation of the anti-trust statute. This contention is founded upon the decision in *United States v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, upon which the trial court based its decision. A comparison of the *Knight case* with the case at bar shows some striking superficial resemblances. Both relate to actions of the American Sugar Refining Company in obtaining control of independent sugar refining companies in Philadelphia. But there is this fundamental distinction between them: The one was an agreement for the restriction of competition which related directly to manufacture and only indirectly to interstate commerce; the other was a conspiracy to prevent a manufacturer from engaging in business which necessarily directly restrained interstate commerce. An agreement or combination for the elimination of competition, from an economic point of view, may not operate in restraint of trade. It may

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actually develop and increase trade. Such an agreement, however, from a legal viewpoint, is necessarily in restraint of trade. The law regards competition as the life of trade, and so that which restricts competition restrains trade. But a contract in restraint of trade may or may not be in restraint of interstate trade. If it directly affect only production within the limits of a state, it is in restraint of intrastate trade and is subject only to state laws. Any remote or incidental effect upon interstate trade is insufficient to bring it within the federal enactment. If, however, the contract go further and, for example, control the disposition of the manufactured article across state lines, it directly affects interstate commerce, and thus may contravene both state and national laws. On the other hand, a conspiracy to prevent a manufacturer who procures his supplies and disposes of his products by means of interstate commerce from engaging in business at all necessarily places restraints upon such commerce. Its flow is restricted and interrupted. The importation and exportation of articles of commerce are directly prevented, and none the less so because the conspiracy may be of so wide a scope as to interfere with interstate commerce also.

Now, in the *Knight case* there was an agreement for the elimination of competition, and not a conspiracy. In that case the United States brought suit to annul certain contracts by which the American Sugar Refining Company acquired, through the exchange of shares, controlling interests in several competing refineries in Philadelphia. These refineries continued in operation after such acquisition of control, and the amount of sugar refined in Philadelphia was increased. The arrangement had for its object a unification of interests in the business of sugar refining in Pennsylvania. No intention to place any restraint upon interstate commerce was shown, and the contracts in question bore no direct relation to such commerce. Any restraint which was created by legal construction was indirect and remote. In the present case the elements of agreement and combination for the elimination of competition are wholly absent. The object of the conspiracy was to exclude the plaintiff from business, not to unite with it. The refinery was to be shut down and

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not operated. The interstate shipments which would have resulted from its operation were prevented. Instead of there being a development of business and increase of traffic, the possibility of there being any traffic at all was excluded.

The decision in the *Knight case* was that upon the proofs the agreements there in question related to manufacture—to production—and were not in restraint of interstate commerce, although they may have affected such commerce incidentally and indirectly. But there is present in this case that which Mr. Chief Justice Fuller said was absent in the *Knight case*, 156 U. S. 1, 17, 15 Sup. Ct. 249, 39 L. Ed. 325:

“There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected, was not enough to entitle complainants to a decree.”

In the present case the proofs, if supporting the allegations, would show a conspiracy which could have no other possible result than to put a direct restraint upon interstate commerce. The complaint alleges specifically that the object and intention of the conspirators was to prevent interstate importation and exportation as well as intrastate manufacture. “The object and intention of the combination determined its legality.” *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488. See, also, *Swift v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518. Had the complaint merely charged a conspiracy to prevent the plaintiff from procuring its materials by means of interstate commerce, it would manifestly have stated a conspiracy prohibited by the statute. In our opinion, it stated such a conspiracy none the less when it went further and charged a conspiracy to prevent the plaintiff from engaging in any business at all, interstate or intrastate. This extract from the opinion of Mr. Justice Holmes in *Swift v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, is pertinent:

“Although the combination alleged embraces restraint and monopoly of trade within a single state, its effect upon commerce among the states is not accidental, secondary, remote, or merely probable. On the allegations of the bill the latter commerce no less, perhaps even more, than commerce within a single state, is an object of attack.”

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See, also, *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488.

It must be clearly borne in mind that the defendants in this case are not charged simply with preventing the plaintiff from engaging in a manufacturing business. If they were, the *Knight* decision would undoubtedly be applicable. They are expressly charged also with preventing the plaintiff from engaging in interstate commerce—with preventing the importation of raw materials and the exportation of the manufactured product. In fact, the allegations go so far as to charge a conspiracy to prevent the interstate transportation of materials and products. In the face of these allegations this court cannot say, as a matter of law, that the main purpose of the conspiracy was to prevent manufacture, and that its effect upon interstate trade was incidental and remote. The combination in the *Knight case* was for the purpose of procuring control of the corporations in question, and, undoubtedly, of monopolizing the sugar business. The purpose of the conspiracy in the present case was not only to obtain control of the plaintiff corporation, and thus doubtless acquire a monopoly, but to exercise the power of control so obtained to wholly prevent the plaintiff from engaging in a business, the carrying on of which necessarily involved interstate commerce.

If we are to apply in the present case the principles of a case involving a contract or combination for the elimination of competition, those stated in *Addyston Pipe, etc., Co. v. United States*, 175 U. S. 239, 20 Sup. Ct. 96, 44 L. Ed. 136, are more nearly applicable than those of the *Knight case*. In the *Addyston Pipe case* Mr. Justice Peckham said, distinguishing the *Knight case*:

"The direct purpose of the combination in the *Knight case* was the control of the manufacture of sugar. There was no combination or agreement, in terms, regarding the future disposition of the manufactured article; nothing looking to a transaction in the nature of interstate commerce. The probable intention on the part of the manufacturer of the sugar to thereafter dispose of it by sending it to some market in another state was held to be immaterial and not to alter the character of the combination. \* \* \* The case was decided upon the principle that a combination simply to control manufacture [259] was not a violation of the act of Congress, because



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such contract or combination did not directly control or affect interstate commerce; but that contracts for the sale and transportation to other states of specific articles were proper subjects of regulations, because they did form part of such commerce. We think the case now before us involves contracts of the nature last above mentioned, not incidentally or collaterally, but as a direct and immediate result of the combination engaged in by the defendants. \* \* \* If, therefore, an agreement or combination directly restrains, not alone the manufacture, but the purchase, sale, or exchange of the manufactured commodity among the several states, it is brought within the provisions of the statute. The power to regulate such commerce—that is, the power to prescribe the rules by which it shall be governed—is vested in Congress, and, when Congress has enacted a statute such as the one in question, any agreement or combination which directly operates, not alone upon the manufacture, but upon the sale, transportation, and delivery of an article of interstate commerce, by preventing or restricting its sale, etc., thereby regulates interstate commerce to that extent, and to the same extent trenches upon the power of the national Legislature and violates the statute.”

In this case the complaint alleges that the plaintiff had been engaged in the purchase of raw materials in different states and in their transportation to Pennsylvania, in the manufacture of the refined sugar there, and in the sale of the manufactured product and its transportation to other states and countries. It further alleges that the object of the conspiracy was to prevent the plaintiff from re-engaging in all those undertakings, which was accomplished by preventing it from engaging in business at all. The conspiracy directly operated not alone upon the manufacture, but upon the purchase, sale, transportation, and delivery of an article of interstate commerce by preventing altogether such purchase, sale, transportation, and delivery, as well as such manufacture. And thereby, in the words of the *Addyston Pipe case*, it “regulates interstate commerce to that extent, and to the same extent trenches upon the power of the national Legislature and violates the statute.”

*Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, is, however, the case which, more than any other, seems of controlling authority here. In that case, like this, there was no combination or agreement for the elimination of competition, but a conspiracy to prevent a manufacturer from carrying on his business. Mr. Chief Justice Fuller said

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(page 300 of 208 U. S., page 309 of 28 Sup. Ct. [52 L. Ed. 488]):

"The averments here are that there was an existing interstate traffic between the plaintiffs and citizens of other states, and that for the direct purpose of destroying such interstate traffic defendants combined not merely to prevent plaintiffs from manufacturing articles then and there intended for transportation beyond the state, but also to prevent the vendees from reselling the hats which they had imported from Connecticut, or from further negotiating with plaintiffs for the purchase and intertransportation of such hats from Connecticut to the various places of destination. So that, although some of the means whereby the interstate traffic was to be destroyed were acts within a state, and some of them were in themselves, as a part of their obvious purpose and effect, beyond the scope of federal authority, still, as we have seen, the acts must be considered as a whole, and the plan is open to condemnation, notwithstanding a negligible amount of intrastate business might be effected in carrying it out. If the purposes of the combination were, as alleged, to prevent any interstate transportation at all, the fact that the means operated at one end beyond physical transportation com- [260] menced, and at the other end after the physical transportation ended, was immaterial."

The averments in the present complaint cannot be distinguished in principle from those appearing in the Loewe complaint. In both it is alleged that the respective defendants combined not only to prevent the respective plaintiffs from manufacturing articles intended for interstate transportation, but also to prevent them from engaging in interstate transportation and traffic at all. It is true that in this case, as in that case, the conspiracy affected intrastate as well as interstate business, but, as we have already seen, it affected the latter none the less because it affected the former.

For these reasons, we think that the conspiracy charged in the complaint does not relate wholly to production within the state of Pennsylvania, and that the present case is not controlled by the Knight decision.

The defendants next contend that the complaint fails to state a cause of action, because it appears that the plaintiff was not engaged in business at the time of the conspiracy; that it had no established business to injure. But in the very recent case of *Thomsen v. Union Castle Mail Steamship Co.* (decided October, 1908), 166 Fed. 251, this court said: "It is as unlawful to prevent a person from engaging in business

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as it is to drive a person out of business." A person has a legal right to engage in a lawful business. If he is unlawfully excluded from exercising this right, when he is prepared and intends to exercise it, he suffers an injury for which the law awards damages—he is "injured" within the meaning of the federal statute. He may be unable to prove substantial compensatory damages, but in stating the infringement of his legal rights he states a cause of action at least for nominal damages, and may, perhaps, so state it as to call for exemplary damages. *Scott v. Donald*, 165 U. S. 58, 17 Sup. Ct. 265, 41 L. Ed. 632.

But the defendants further urge that the complaint merely shows a naked intention to engage in interstate commerce, and that legal damages cannot be predicated upon the prevention of the carrying out of any such intention. We cannot so regard the allegations of the complaint. It is averred that the plaintiff had been engaged in interstate commerce, had temporarily ceased to do business, had built a new refinery at great expense, and was prepared and intended to resume business as before. Something more than a mere mental intention to engage in interstate commerce is involved when a corporation spends millions of dollars in building a sugar refinery which is only of use when operated and which can only be operated by engaging in interstate commerce. The amount of money actually lost in the enterprise cannot be regarded as wholly speculative and problematical.

It is next contended that the complaint failed to show that the defendants did anything which was "forbidden or declared to be unlawful" by the federal anti-trust statute. As already shown, however, the complaint charges that defendant combined and conspired to prevent the plaintiff from engaging in business and in interstate commerce; that they induced Segal to accept a loan from the American Sugar Refining Company and to pledge as security therefor a majority of the [261] capital stock of the plaintiff corporation under such conditions that the American Company obtained the absolute voting power thereon; that the American Company used this power to elect directors favorable to the carrying out of the object of the conspiracy, and that such directors

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accomplished such object by voting that the plaintiff should not engage in business. The substance of the charge is that the defendants obtained the control of the plaintiff corporation to ruin it and to prevent it from ever becoming a competitor of the American Company, and that they carried out their unlawful purpose in violation of the trust imposed upon the majority stockholders for the benefit of the minority, and by inducing directors to be unfaithful in the performance of the duties of their office. In our opinion, the complaint sufficiently states a conspiracy in restraint of interstate trade and commerce within the meaning of the federal statutes. Indeed, no more effectual means to make a conspiracy effective could be devised than the manipulation, in the manner described in the complaint, of the control afforded by holding a majority stock interest—manipulation wholly in violation of the trust obligation of a majority stockholder to the minority and of the directors to all the stockholders.

It is finally contended that, if the conspiracy was illegal, the plaintiff was a party to it, and cannot maintain an action against the other parties. The answer to this contention is that a corporation cannot conspire that its own directors shall be unfaithful to it. Action which directors take in the name of their corporation, detrimental to its interests and in bad faith, is, with respect to them, the act of the corporation in name only. Directors and other persons entering into a conspiracy to obtain such action for wrongful and ulterior purposes are liable to the corporation for the damages caused thereby. Nothing is shown in this case to call for the application of the doctrine, "*In pari delicto potior est conditio defendentis.*"

It may be that the plaintiff will be unable to establish the allegations of its complaint—will be unable to show any such unlawful conspiracy as it alleges. But the allegations are very broad and sweeping. They state a cause of action, and the plaintiff is entitled to an opportunity to prove them if it can.

There was error in dismissing the complaint, and, accordingly, the judgment of the Circuit Court is reversed.

Syllabus.

AMERICAN BANANA CO. v. UNITED FRUIT CO.\*

(Circuit Court of Appeals, Second Circuit. December 15, 1908.)

[166 Fed. Rep., 261.]

**MONOPOLIES (§ 23—ANTI-TRUST ACT—EXISTING BUSINESS.**—In order to state a cause of action for damages for conspiracy in restraint of interstate commerce under the federal Anti-Trust Act, it is not necessary to allege injury to an existing business, though it is necessary to state facts showing an intention and preparedness to engage in business, it being as unlawful to prevent a person from engaging in business as it is to drive one out of business.<sup>b</sup>

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 28.]

[262] **MONOPOLIES (§ 23)—CONSPIRACY IN RESTRAINT OF INTERSTATE COMMERCE—COMPLAINT—INCIDENTAL ALLEGATIONS.**—Where a complaint for conspiracy in restraint of foreign commerce in violation of the federal Anti-Trust Act charged injury to plaintiff's plantation by Costa Rican officials resulting from an alleged conspiracy with defendant, and also that defendant controlled the banana market in the West Indies and in Central and South America and prevented plaintiff from buying and shipping bananas to the United States and selling them to its great profit, which it would otherwise have done, such latter allegation would be treated as incidental to plaintiff's demand for damages for injury to its plantation, in the absence of an allegation that plaintiff had invested any money in preparing to engage in buying, shipping, and selling bananas as a business independent of the operation of its own plantation.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 28.]

**INTERNATIONAL LAW (§ 12)—ACTS OF FOREIGN GOVERNMENT.**—Where Costa Rica was de facto sovereign over that part of Panama, including the McConnell concession, at the time plaintiff's plantation and railroad in such concession was injured by the acts of the Costa Rican soldiers and officers acting under governmental authority, such acts were immune from investigation or review by the courts of the United States.

[Ed. Note.—For other cases, see International Law, Dec. Dig. § 12.]

**PRINCIPAL AND AGENT (§ 14)—GOVERNMENT AND INFORMER—INFORMER'S LIABILITY.**—Where plaintiff's plantation in Panama, over which the Costa Rican government exercised de facto sovereignty, was injured through the acts of the Costa Rican officers and soldiers act-

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\* For opinion of Circuit Court (160 Fed. Rep., 184) see *ante*, p. 372.

<sup>b</sup> Syllabus copyrighted, 1909, by West Publishing Co.

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ing pursuant to an alleged conspiracy between the officers of the Costa Rican government and defendant, plaintiff, competitor in business, defendant could not be charged with the acts of such Costa Rican officials on the theory that the Costa Rican government merely acted as defendant's agent in carrying out its desires, there being nothing to show that the Costa Rican government was not acting on its own responsibility and in its governmental capacity.

[Ed. Note.—For other cases, see *Principal and Agent*, Dec. Dig. § 14.]

## TORTS (§ 22)—JOINT TORT-FEASORS—GOVERNMENT AND INDIVIDUAL.—

Where officers and soldiers of Costa Rica committed depredations on plaintiff's plantation in Panama, through an alleged conspiracy between defendant and the governing officials of Costa Rica, defendant and the Costa Rican government could not be regarded as joint tort-feasors.

[Ed. Note.—For other cases, see *Torts*, Dec. Dig. § 22.]

In Error to the Circuit Court of the United States for the Southern District of New York.

For opinion below, see (C. C.) 160 Fed. 184.

*Wheeler, Cortis and Haight* (*Everett P. Wheeler, Clarence B. Smith, and John W. Griffen*, of counsel), for plaintiff in error.

*Strong and Cadwalader* (*Moorfield Storey and Henry W. Taft*, of counsel), for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge.

This is an action for the recovery of treble damages under the seventh section of the federal anti-trust statute (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]).

The complaint alleges, in substance, that the defendant corporation was organized in 1899, and thereafter at all times engaged in the business of importing bananas into the United States from Central and South America; that in 1899 and subsequent years, for the purpose of [263] monopolizing the banana trade between such countries, of regulating

## Opinion of the Court.

prices, controlling production, and preventing competition, the defendant acquired the property and business of several competing corporations and individuals, entered into contracts regulating prices and restricting business with other competitors, acquired controlling stock interests in still others, and organized a common selling agent for all; that in April, 1903, one McConnell began to make a banana plantation upon the northerly bank of the Sixola river in Panama, then a part of the United States of Colombia, and to build a railway connecting said plantation with the nearest port and affording the only practicable means of access to the plantation; that said McConnell obtained the transfer of a concession to build such railroad from an official of the United States of Colombia, who subsequently recommended to his government that Costa Rica be allowed to administer the territory through which it was to run, notwithstanding such territory had previously been awarded to Colombia by an award of the President of France acting in accordance with a treaty between Colombia and Costa Rica; that in November, 1903, that part of the United States of Colombia known as the "Department of Panama," and including the territory in question, revolted and became the republic of Panama; that in June, 1904, the plaintiff corporation, which had been organized for the purpose of growing and buying bananas in Central America and importing them into the United States, purchased said plantation and concession from McConnell, and spent large sums of money in the development of the plantation and construction of the railroad; that in July, 1904, Costa Rican soldiers and officials, instigated and induced by the defendant, seized a portion of the plaintiff's plantation and a cargo of supplies recently landed thereon; that said soldiers and officials have continued to forcibly occupy and hold said portion of said plantation, have stopped the construction and operation of said railroad, and have wholly prevented the plaintiff from carrying on its business; that the plaintiff has endeavored to induce the government of Costa Rica to withdraw its soldiers and officials, but such government has refused to do so; that the defendant has purchased an alleged title to the plaintiff's plantation, and has instituted certain proceedings there-

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under, and that the defendant and its associates have combined to prevent the sale of bananas to other exporters than themselves, and have made such arrangements with growers that there is no market in which bananas can be purchased by the plaintiff for export.

The defendant answered, and the case came on for trial, when the defendant moved to dismiss the complaint upon the ground that it failed to state a cause of action. This motion was granted by the trial court, and the plaintiff brings this writ of error.

The seventh section of the federal and anti-trust statute, upon which this action is brought, provides that any person "injured in his business or property" by reason of anything forbidden or declared to be unlawful by the act may recover threefold damages. It is then of first importance to ascertain what actions of the defendant have injured the plaintiff. If the complaint contains allegations of actions which have not had that effect, it is unnecessary to consider them, however much they may contravene the other provisions of the statute. Thus [264] the averments concerning the various combinations for the elimination of competition, standing by themselves, are immaterial. If the defendant had not done the things which injured the plaintiff, no cause of action would be stated, even if it were apparent that the pre-existing combinations had been of the most unlawful nature. So the allegations concerning the purchase of the alleged title and the communication of the Colombian official to his government are immaterial, because it does not appear that they injured the plaintiff.

The only damages claimed in the complaint are—stated inversely to the order of their importance: (1) For the injury resulting from the securing of control by the defendant and its associates of the banana market. (2) For the injury to the plantation, business, and railroad inflicted by the Costa Rican officials.

Now, in order to state a cause of action for damages under the statute, it is not necessary to aver an injury to an existing business. As said by this court in *Thomsen v. Union Castle Mail Steamship Co.* (decided October, 1908) 166 Fed. 251, "it is as unlawful to prevent a person from engaging in



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business as it is to drive a person out of business." See, also, *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.* (decided this day) 166 Fed. 254. But it is necessary to state facts showing an intention and preparedness to engage in business. Thus in the *Pennsylvania Sugar Refining case* it was alleged that the plaintiff had erected and equipped a sugar refinery, and was prepared and intended to engage in the manufacture and sale of sugar, when it was prevented from so doing by the acts of the defendants. In the present case, however, it is not alleged that the plaintiff had made any preparations to engage in the business of buying bananas independently of the operation of its own plantation, nor that it desired or intended to engage therein as a separate and independent business. It is not averred that the plaintiff invested any money in preparing to engage in any such independent business; nor does the extent to which, nor even the country in which, it desired or intended to engage therein, appear. The only allegation is that the defendant's control of the banana market in the West Indies and Central and South America prevented the plaintiff "from buying any bananas and shipping them and selling them in the United States, as it would otherwise have done to its great profit." But in view of the other allegations of the complaint, and of the fact that this demand is stated as the basis for claiming "additional" damage, we think that it should be treated as being incidental to the more substantial demand for damages for injuries to the plantation and railroad—that the plaintiff intended to deal in bananas from other plantations only as auxiliary to its principal business of growing and shipping its own fruit. Certainly the allegations are too indefinite and uncertain to state a cause of action based upon an independent and separate demand. Therefore, unless our inquiry shows that the complaint states a cause of action growing out of the acts of the Costa Rican officials, we must hold that it was properly dismissed.

In pursuing this inquiry we may consider, in addition to the facts stated in the complaint, those appearing in the letter of Secretary Root [265] to the American minister at Panama. In this letter the Secretary says, among other things:

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"In the Department's conception of this matter, Costa Rica exercises at present a temporary *de facto* sovereignty over the territory included in the McConnell concession, subject of right to be diverted at any time at the will of Panama, but actually continuing until such time as the pending boundary treaty is ratified. \* \* \*

"In considering the present connection of Panama with the territory in question, it would appear that that state has consented that Costa Rica continue as the *de facto* sovereign until the ratification of the treaty. If Panama should interfere and seek to exercise at present jurisdiction north of the Sixola river, this would be inconsistent with her recognition of Costa Rica's temporary sovereignty in that district. In the view of the Department, as long as the latter government is the sovereign in possession, whatever attributes that accompany or attend possession should be conceded to her, including the right to control by taxation, or otherwise, importations, etc., at Gadocan."

Whatever, therefore, may have been the Loubet award or its effect with respect to the boundary line between Costa Rica and Colombia—whatever may have been the rights *de jure*—we must start with the proposition that the plaintiff's plantation at the time of the acts in question was in territory over which Costa Rica was *de facto* sovereign. We must also treat the acts of the soldiers and officials of Costa Rica as acts done by the authority of the government of that country. The complaint shows that that government in effect ratified such acts and refused to withdraw from the plaintiff's plantation.

Now the only theory upon which the plaintiff can be awarded damages against the defendant is that it is responsible for unlawful acts instigated by it. It cannot be held responsible for procuring that to be done by authority of the government of Costa Rica which was lawful. Consequently this court is called upon to investigate the lawfulness of acts done under the authority of a foreign independent state. But this court cannot undertake any such investigation. The acts complained of were adopted by the government of a sovereign state in its political capacity and in the exercise of its *de facto* sovereignty. The question of their legality or illegality cannot be determined by the courts of another country.

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In *Underhill v. Hernandez*, 65 Fed. 577, 579, 13 C. C. A. 51, 38 L. R. A. 405, this court said:

"Conditions of comity and of the highest expediency require that the conduct of states, whether in transactions with other states or with individuals, their own citizens, or foreign citizens, should not be called in question by the legal tribunals of any other jurisdiction. The citizens of a state have an adequate redress for any grievance at its hands by an appeal to the courts or the other departments of their own government. Foreign citizens can rely upon the intervention of their respective governments to redress their wrongs even by a resort, if necessary, to the arbitrament of war. It would be not only offensive and unnecessary, but it would imperil the amicable relations between governments and vex the peace of nations, to permit the sovereign acts or political transactions of states to be subjected to the examination of the legal tribunals of other states."

And in affirming the judgment in the *Hernandez case* the Supreme Court of the United States said (168 U. S. 251, 18 Sup. Ct. 84, 42 L. Ed. 456):

[266] "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

In Webb's *Pollock on Torts*, p. 137, it is said:

"An act done by the authority, previous or subsequent, of the government of a sovereign state in the exercise of de facto sovereignty, is not examinable at all in the courts of justice of any other state."

See, also, *Duke of Brunswick v. King of Hanover*, 2 H. L. Cas. 1, affirming 6 Beav. 1, 13 L. J. Ch. 107; *Nabob of Arcot v. East India Co.*, 4 Brown, Ch. 131; *Hatch v. Baez*, 7 Hun (N. Y.) 590.

As already indicated, it is sufficient to exclude an examination by this court of the lawfulness of the acts in question that they were committed in territory over which Costa Rica was the de facto sovereign. Indeed, had that government been merely a de facto government its acts could not be called in question. See *Hernandez case* 65 Fed. 577, 582, 13 C. C. A. 51, 38 L. R. A. 405. And the letter of the Secretary of State here shows that Panama even consented that Costa Rica should exercise temporary sovereignty over this territory until the ratification of a treaty between them.

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Upon principle and authority, it follows that Costa Rica is entitled to immunity from any investigation of its sovereign acts by this court. The plaintiff, however, asserts that this immunity is only an immunity from suit which has no bearing upon the defendant's liability. But, as we have seen, the immunity is far broader than this. The validity of an act adopted by a sovereign state cannot be inquired into at all—directly or collaterally—by the courts of another state. Relief must be sought in the courts of the former state or through diplomatic channels.

It is further urged that the Costa Rican government should be treated as the agent of the defendant, and that the defendant should be held responsible as principal for its acts. But the relation of a government acting in its political capacity to a person who furnishes the information upon which it acts cannot, from the very nature of things, be that of principal and agent. The early case of *Rafael v. Verelst*, 2 Wm. Black, 1055, cited by the plaintiff, does not sustain any such proposition. The very point of that case was that the Nabob who seized the plaintiff was not acting as sovereign, but contrary to his own inclination—as “a mere machine, an instrument and engine of the defendant.” In the present case, although instigated by the defendant, there is nothing to show that the Costa Rican government failed to act upon its own responsibility as a sovereign state, or that it ever professed to act in behalf of the defendant.

Upon similar principles, there is no ground for contending that the defendant and the government of Costa Rica were joint tort-feasors. That relation, too, is wholly inconsistent with the relation of a sovereign government acting in its political capacity—as the government of Costa Rica did—to an informer, no matter how malicious the latter might be.

[267] For these reasons, it is held that the acts which resulted in the injury to the plaintiff's business and property were those of the government of Costa Rica, for which the defendant cannot here be held responsible. Consequently the complaint—based upon those acts—fails to state a cause of action.

The judgment of the Circuit Court is affirmed.

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[431] GOSHEN RUBBER WORKS v. SINGLE TUBE  
AUTOMOBILE & BICYCLE TIRE CO.

(Circuit Court of Appeals, Seventh Circuit. October 20, 1908.)

[166 Fed. Rep., 431.]

**PATENTS (§ 266)—LICENSE TO MANUFACTURE—INFRINGEMENT.**—Where goods manufactured under a patent are sold by the patentee or licensee, the royalty having been previously paid or secured, the patentee cannot treat the seller or user as an infringer.\*

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 410; Dec. Dig. § 266.]

**PATENTS (§ 211)—LICENSES—CONTRACT WITH LICENSEES—MODIFICATION.**—An owner of certain patents relating to the manufacture of bicycle and automobile tires executed a license to manufacture and sell to various companies for the full unexpired patent term. Thereafter an agreement was made with the various licensees to secure the payment of royalty on tires to be subsequently made, by which the owner of the patent was enabled to ascertain the exact sales of tires made by each licensee, and the per centum of royalties secured by the agreement was rendered certain in amount. The agreement also provided for the services of an arbitrator, at the sole cost of the licensees, whose decision was made final. *Held*, that such agreement should be treated as a written modification of the license, and, being of benefit to the owner of the patent, was based on a sufficient consideration.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 304, 310; Dec. § 211.]

[432] **MONOPOLIES (§ 14)—SALE OF PATENTED ARTICLES—CONTRACT WITH LICENSEES—VALIDITY—RESTRAINT OF TRADE.**—Since the public, by licenses to manufacture patented automobile tires, only secured the right to purchase the tires after they have been manufactured and offered for sale, and has no right to have the competition between the different licensees continued, a modification of the licenses between the owner of the patent and the various licensees regulating the manufacture and sale of such tires was not objectionable as a restraint of trade, in violation of the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]).

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 11; Dec. Dig. § 14.]

In Error to the Circuit Court of the United States for the District of Indiana.

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## Statement of the Case.

"Action by a patentee against a licensee to recover an agreed sum being royalties for the use of the invention.

"The defense set up is that the agreement upon which suit was brought constitutes a restraint of trade and is therefore invalid. The case is much like *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.* (C. C.) 142 Fed. 531; *Consolidated Rubber Tire Co. v. Diamond Rubber Co.* of New York, 157 Fed. 678, 85 C. C. A. 349. All the pleadings were withdrawn by leave of court except the amended declaration, and an answer was filed setting up facts tending to support the defense that the agreement sued on was one in restraint of trade and therefore invalid. A demurrer to the answer was filed, which was sustained by the court. The defendant declined to answer over, whereupon judgment for the plaintiff was rendered, and the case was removed by writ of error into this court.

"The facts are that the defendant in error, the Single Tube Automobile & Bicycle Tire Company, is the owner of certain letters patent for the manufacture of automobile and bicycle tires. On July 19, 1902, it licensed the plaintiff in error, the Goshen Rubber Works, to manufacture, sell, and use tires embodying the invention, for a license fee of \$3 per pair, and certain sums in addition to such royalty. The license was for the full unexpired portion of the patent term. Before and after the license was made, the Single Tube Company made similar licenses to a number of other companies, and on September 16, 1903, a "licensees' agreement," so called, was made between the Single Tube Company and all of its licensees, including the Goshen Company. The contract sued on is the licensees' agreement. This agreement runs for one year, and is in general terms similar to the agreement set out in the *Rubber Tire Wheel* case. It recites that the parties have been licensed by the Single Tube Company to manufacture and sell tires under the patent, and that it is the desire of all the parties that the right and license to manufacture shall be exercised to the extent set forth in the agreement upon uniform terms and conditions; that all the operations of the licensees shall be supervised to the said desired end by an impartial administration. Therefore it is agreed that the licensees shall each pay to one Jackson, who is appointed in the agreement to supervise the transactions between the parties, \$500 for each 1 per centum, and a ratable amount for each fraction thereof of the quota of each of the licensees, which quota was fixed according to the number of tires manufactured by each licensee. Those licensees exceeding the quota agreed upon should pay additional royalty of 25 per centum on the amount over the quota of each, and if less, then the licensee should receive a like percentage on the amount it might be short. The kind of bicycle tires to be manufactured was restricted, and the prices therefor fixed, as well as the prices on carriage and automobile tires. All royalties collected by the Single Tube Company were to be paid over to Jackson, less the amounts provided for in the respective license agreements to each of the licensees. If

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any licensee should sell any tires at cut prices, it should forfeit an amount equal to the entire amount involved to be divided among the other parties to the agreement. Jackson was to have inspection of all contracts and books of account of the licensees, [483] and decide any and all questions arising between any of the parties to the contract. His decision was to be final, each party agreeing to abide thereby. Jackson's compensation was to be agreed upon between him and the Single Tube Company. The validity of this agreement was challenged by the answer as falling within the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), and also upon the ground that the subject-matter of the licensees' agreement had been released from the dominion of the patent monopoly at the time such agreement was made, and was subject to the provisions of such act; in other words, that there was no consideration for the licensees' agreement because the licensor had authorized the Goshen Company to make, use, and sell the monopoly secured by the patent for its full term, and the licensees' agreement was therefore without consideration."

*S. C. Hubbell*, for plaintiff in error.

*Augustus L. Humes*, for defendant in error.

Before BAKER and SEAMAN, Circuit Judges, and SANBORN, District Judge.

SANBORN, District Judge (after stating the facts as above).

If the patentee still retained an interest in the patent and the licensees' agreement was made on sufficient consideration, the case is entirely ruled by *Rubber Tire Wheel Co. v. Milwaukee Rubber Works*, above cited. It is, however, sought to distinguish that case by the argument that the licenses to various manufacturers for the full term of the patent divested the patentee of any further interest, and operated to release the patented devices from the monopoly of the patent. Of course, the patentee still remains the owner. The licenses might be modified at any time by any subsequent arrangement between licensor and licensee. If the subsequent licensees' agreement was for the benefit of the owners of the patent, then it was upon sufficient consideration, amounted to a modification of the licenses, and was in all respects a valid contract. It is familiar law that articles manufactured under the term of the patent are taken out of the limits of the monopoly and become part of the common property of the country. When they are sold by the patentee or his licensee, the royalty having been pre-

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viously paid or secured, the patentee, having once received his royalty cannot treat the seller or user as an infringer. *Morgan Envelope Co. v. Albany Paper Co.*, 152 U. S. 425, 14 Sup. Ct. 627, 38 L. Ed. 500; *National Phonograph Co. v. Schlegel*, 128 Fed. 733, 64 C. C. A. 594. The licensees' agreement, however, related entirely to tires to be manufactured in the future, upon which no royalty had been paid. The licensees' agreement was made for the purpose of securing the payment of the royalty upon tires to be subsequently made, and the patentee had a vital interest in the character and the amount of the tires to be so manufactured. It will hardly be denied that, if at any time the licensees' operations were unsatisfactory, the parties might by subsequent agreement modify them; or, if the operations of the licensee were so unsatisfactory and unbusinesslike as to amount to a breach of the agreement, the licensor would have the right to terminate it and make a license to another.

It seems clear, therefore, that the dominion of the patentee remains for the purpose of securing a substantial performance of the agreement made by the licensee. The only right secured to the public by the licenses was to purchase the tires after they had been manufactured and [434] offered for sale. It did not obtain the right to have the competition between the different licensees continued, or in any way obtain an embargo against a modification of the licenses.

The following purposes beneficial to the Single Tube Company were secured by the agreement sued on: It was enabled to ascertain the exact amount of sales of the patented tires made by each licensee; the per centum of royalties secured by the agreement was rendered certain in amount. The reputation and value of the patented tires may have been further increased by the provisions as to price and quality of tires to be made. The services of an arbitrator were secured at the sole cost of the licensees. The decision of the arbitrator was made final, thereby preventing possible litigation between the parties. And the agreement in suit may be regarded as a written modification of the license. All of these matters are beneficial to the patentee, and form a sufficient consideration for the agreement.

The judgment of the Circuit Court is affirmed.



Syllabus.

[555] BLOUNT MFG. CO. v. YALE & TOWNE MFG. CO.

(Circuit Court, D. Massachusetts. January 14, 1909.)

[186 Fed. Rep. 555.]

**MONOPOLIES (§12)—CONTRACT IN RESTRAINT OF TRADE—PATENTED ARTICLES.**—Where certain contracts between manufacturers of liquid door checks restrained each of the parties in the exercise of its rights under its own patents and in the sale of its articles made thereunder, the contracts were not rendered valid, though in restraint of interstate commerce, because they also authorized each of the parties to use patented inventions belonging to the others.\*

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 12.]

**MONOPOLIES (§ 12)—PATENTED ARTICLES—LICENSE—SHERMAN ACT.**—A sale or license of a patented article, with a covenant not to compete, made as an ordinary incident to enhance the value of the thing conveyed, was not within Sherman Anti-Trust Act (Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]).

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 12.]

**PATENTS (§ 191)—RIGHT OF PATENTEE—USE—CONTRACTS.**—While it is the ordinary privilege of the owner of a patent to use, or not, without question of motive, the grant of a patent confers on the patentee no right not to use his invention, or to agree not to do so, in restraint of trade in that article, except in connection with an assignment of the rights conferred by the letters patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 268; Dec. Dig. § 191.

Power of patentee to control his invention, see note to *Heaton-Peninsular B. F. Co. v. Eureka Specialty Co.*, 25 C. C. A. 280.]

**MONOPOLIES (§ 12)—CONTRACT IN RESTRAINT OF TRADE—PATENT ARTICLE—RESTRICTION OF USE.**—Contracts between manufacturers of liquid door checks under various patents, by which each agreed to restrict its own trade in the article of his own invention, not as an incident to a grant of rights under patents, but to enhance the price by the removal of competition, and which constituted a general plan to regulate and control the business of dealing in such checks sold in interstate commerce, the plan comprehending the maintenance of price, the pooling of profits, the elimination of competition, and restraint of improvements, constituted a violation of the Sherman anti-trust act (Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), and were therefore unenforceable.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 12.]

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*Opinion of the Court.*

In Equity. On demurrer to bill of complaint.

*George L. Mayberry and W. H. Leonard, for complainant.*

*Fisk, Richardson, Herrick and Neave, for defendant.*

BROWN, District Judge.

This is a demurrer to a bill for an accounting in accordance with the terms of a contract concerning the profits arising from the manufacture and sale of liquid door checks.

This contract, Exhibit A, is made part of the bill. The bill alleges the contemporaneous making of a contract between the complainant and the P. & F. Corbin Company, Exhibit B. By reference this is made a part of the contract, Exhibit A. The Blount Manufacturing [556] Company, complainant, being a party to both contracts, we may conveniently distinguish them by calling Exhibit A the "Yale & Towne contract," and Exhibit B the "Corbin contract."

I am of the opinion that the true contractual relations between this complainant and defendant must be sought in both contracts, and that the validity of the Yale & Towne contract is to be determined by examination of the effect of both.

In an accounting under the Yale & Towne contract the complainant's share of profit would be determined, in accordance with paragraph 3, by finding the difference between the net prices actually received and the arbitrarily fixed "contract ones" set forth as an agreed basis for accounting; said difference to be increased or diminished by one-half of the net amount received or paid in settlements between the Blount Manufacturing Company and the Corbin Company. The Yale & Towne Company is thus directly interested in the Corbin contract. It has signed as an associate party, and has assented to the provisions of the Corbin contract, as appears in paragraph 27 of that contract. Paragraph 3 of the Yale & Towne contract also provides that prices are to be determined from time to time by agreement between the Blount Manufacturing Company, the Yale & Towne Manufacturing Company, and the Corbin Company.

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Such relations are established between the complainant, the defendant, the Corbin Company, and the Russell & Erwin Company that the contracts before us must be regarded as related parts of a general plan to regulate and control the business of dealing in liquid door checks. The plan comprehends the maintaining of prices, the pooling of profits, the elimination of competition, and the restraint of improvements.

If relating to ordinary articles of trade or commerce, it seems reasonably clear that these contracts would be in violation of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), known as the "Sherman Anti-Trust Act," and therefore unenforceable.

The complainant contends that the demurrer should be overruled, because such contracts are legal and valid when the subject-matter of the contract comprises solely articles the manufacture and sale of which are protected by patents. The amended bill alleges in effect that all liquid door checks manufactured or sold at the time of the execution of the contracts embodied patented devices or improvements.

While the language of the contracts is broad enough to cover unpatented as well as patented articles, yet in view of the allegations of the amended bill I should hesitate to sustain the demurrer merely on the ground that the contract covers articles which do not embody patents. The principal question is whether the fact that the articles to which the agreements relate embody patented inventions is sufficient to make the Sherman Act inapplicable. This question was not passed upon by the Supreme Court in *Bement v. National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058. That decision related to restraints and conditions imposed in connection with the grant of patent rights.

*Rubber Tire & Wheel Company v. Milwaukee Rubber Company*, 154 Fed. 358, 83 C. C. A. 336, and *Indiana Manufacturing Company*, [557] 154 Fed. 365, 83 C. C. A. 343, are cited by the complainant, but the decisions are not directly in point.

It seems self-evident that a contract which is only coextensive with the monopoly conferred by letters patent, and

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In Equity. On demurrer to bill of complaint.

*George L. Mayberry and W. H. Leonard*, for complainant.

*Fish, Richardson, Herrick and Neave*, for defendant.

BROWN, District Judge.

This is a demurrer to a bill for an accounting in accordance with the terms of a contract concerning the profits arising from the manufacture and sale of liquid door checks.

This contract, Exhibit A, is made part of the bill. The bill alleges the contemporaneous making of a contract between the complainant and the P. & F. Corbin Company, Exhibit B. By reference this is made a part of the contract, Exhibit A. The Blount Manufacturing [556] Company, complainant, being a party to both contracts, we may conveniently distinguish them by calling Exhibit A the "Yale & Towne contract," and Exhibit B the "Corbin contract."

I am of the opinion that the true contractual relations between this complainant and defendant must be sought in both contracts, and that the validity of the Yale & Towne contract is to be determined by examination of the effect of both.

In an accounting under the Yale & Towne contract the complainant's share of profit would be determined, in accordance with paragraph 7, by finding the difference between the net prices actually received and the arbitrarily fixed "contract costs" set forth as an agreed basis for accounting; said difference to be increased or diminished by one-half of the net amount received or paid in settlements between the Blount Manufacturing Company and the Corbin Company. The Yale & Towne Company is thus directly interested in the Corbin contract. It has signed as an associate party, and has assented to the provisions of, the Corbin contract, as appears in paragraph 17 of that contract. Paragraph 5 of the Yale & Towne contract also provides that prices are to be determined from time to time by agreement between the Blount Manufacturing Company, the Yale & Towne Manufacturing Company, and the Corbin Company.

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Such relations are established between the complainant, the defendant, the Corbin Company, and the Russell & Erwin Company that the contracts before us must be regarded as related parts of a general plan to regulate and control the business of dealing in liquid door checks. The plan comprehends the maintaining of prices, the pooling of profits, the elimination of competition, and the restraint of improvements.

If relating to ordinary articles of trade or commerce, it seems reasonably clear that these contracts would be in violation of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), known as the "Sherman Anti-Trust Act," and therefore unenforceable.

The complainant contends that the demurrer should be overruled, because such contracts are legal and valid when the subject-matter of the contract comprises solely articles the manufacture and sale of which are protected by patents. The amended bill alleges in effect that all liquid door checks manufactured or sold at the time of the execution of the contracts embodied patented devices or improvements.

While the language of the contracts is broad enough to cover unpatented as well as patented articles, yet in view of the allegations of the amended bill I should hesitate to sustain the demurrer merely on the ground that the contract covers articles which do not embody patents. The principal question is whether the fact that the articles to which the agreements relate embody patented inventions is sufficient to make the Sherman Act inapplicable. This question was not passed upon by the Supreme Court in *Bement v. National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058. That decision related to restraints and conditions imposed in connection with the grant of patent rights.

*Rubber Tire & Wheel Company v. Milwaukee Rubber Company*, 154 Fed. 358, 83 C. C. A. 336, and *Indiana Manufacturing Company*, [557] 154 Fed. 365, 83 C. C. A. 343, are cited by the complainant, but the decisions are not directly in point.

It seems self-evident that a contract which is only coextensive with the monopoly conferred by letters patent, and

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which creates no additional restraint of trade or monopoly, does not conflict with the Sherman Act. The monopoly granted by letters patent is of a particular invention. Devices thus protected by patents are as a matter of fact in commercial competition with both patented and unpatented devices. A contract whereby the manufactures of two independent patented inventions agree not to compete in the same commercial field deprives the public of the benefits of competition, and creates a restraint of trade which results, not from the granting of letters patent, but from agreement. While the monopoly of the patented articles is not increased, the monopoly of the commercial field is increased by the "unified tactics" as to prices.

This question was directly considered by the Circuit Court of Appeals of the Third Circuit in *National Harrow Company v. Hench*, 83 Fed. 36-38, 27 C. C. A. 349, 351, 39 L. R. A. 299. The opinion says:

"The fact that the property involved is covered by letters patent is urged as a justification; but we do not see how any importance can be attributed to this fact. Patents confer a monopoly as respects the property covered by them, but they confer no right upon the owners of several distinct patents to combine for the purpose of restraining competition and trade. Patented property does not differ in this respect from any other. The fact that one patentee may possess himself of several patents, and thus increase his monopoly, affords no support for an argument in favor of a combination by several distinct owners of such property to restrain manufacture, control sales, and enhance prices."

See, also, *National Harrow Company v. Hench* (C. C.) 76 Fed. 667; *National Harrow Company v. Quick* (C. C.) 67 Fed. 130.

The bill does not aver that the articles made by each company embody features covered by the patents of the other. While the contracts provide that the parties are licensed to use patented inventions of the other, this does not alter the fact that by the terms of the contracts each party is restrained in the exercise of its rights under its own patents, and in the sale of articles made solely under its own patents.

The right of the owner of letters patent to assign rights to manufacture, use, and vend, upon condition that the assignee shall maintain certain prices, and to agree not to com-

## Opinion of the Court.

pete with his assignee or to license others to compete, is recognized in *Bement v. National Harrow Company*, 186 U. S. 93, 22 Sup. Ct. 747, 46 L. Ed. 1058.

Whether a patentee may not lawfully make such a license agreement in consideration of the making of a like license agreement by another patentee is a somewhat interesting question. If, as a result of mutual licenses, there is put upon the market an article embodying the inventions of both patentees, so that as the effect of exchange of licenses a new article of commerce is developed, it is doubtful if the public is thereby unlawfully deprived of any of its rights or expectations of free competition. Where, however, each patentee continues to make his own goods under his own patents, and seeks to enhance his profits by an agreement with competitors, who make either patented or unpatented articles, then it seems to follow that the agreement of [558] each to restrain his own trade cannot be regarded merely as an incident to the assignment of patent rights. The patentee then restrains his own trade, not for the purpose of enhancing the value of the license which he grants, but for the purpose of enhancing the value of his trade by removing competition. A sale or license, with a covenant not to compete, made as an ordinary incident to enhance the value of the thing conveyed, is not within the Sherman Act. *Cincinnati Packet Company v. Bay*, 200 U. S. 179-185, 26 Sup. Ct. 208, 50 L. Ed. 428; *U. S. v. Freight Association*, 166 U. S. 329, 17 Sup. Ct. 540, 41 L. Ed. 1007.

By the terms of the present contracts each party limits its trade in goods made under its own patents.

In *Rubber Tire Company v. Milwaukee Company*, 154 Fed. 362, 83 C. C. A. 336, on which complainant relies, it was said in the opinion of the majority of the court:

"The Sherman law contains no reference to the patent law. Each was passed under a separate and distinct constitutional grant of power. Each was passed professedly to advantage the public. The necessary implication is not that one iota was taken away from the patent law. The necessary implication is that patented articles, unless or until they are released by the owner of the patent from the dominion of his monopoly, are not articles of trade or commerce among the several states."

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Judge Grosscup was unable to concur in this proposition.

The question whether agreements concerning patented articles are within the provisions of the Sherman Anti-Trust Act must be determined by a consideration of the nature of the rights conferred by the grant of a patent.

While it is the ordinary privilege of the owner of patent rights to use or not to use them without question of motive, the grant of letters patent confers upon the patentee no right not to use his invention, or to make an agreement in restraint of trade in that article, save in connection with an assignment of the rights conferred by letters patent. The proposition that an agreement not to manufacture, or to restrain trade, is within some rights of nonuse conferred upon a patentee, seems unsound, if we consider the nature of the grant of letters patent. The right of the patentee or of his assignee to withhold the invention is quite apart from any grant contained in the letters patent. The privilege of restraining others is granted to the owner of letters patent. He is given no right or privilege to restrain himself. By the terms of the patent he has the exclusive right to make, use, and vend. The right to make, use, and vend he has without the grant of letters patent. When we say that a patent grants an "exclusive right," we do not mean that the right to make, use, and vend is granted, but only that the patentee's existing right is made exclusively by the grant.

In the *Paper Bag Patent case*, 210 U. S. 424, 425, 28 Sup. Ct. 748, 753, 52 L. Ed. 1122, it was said with reference to previous decisions relating to the nature of the patent grant:

"Those cases declare that he receives nothing from the law that he did not have before, and that the only effect of the patent is to restrain others from manufacturing and using that which he has invented. *United States v. Bell Telephone Company*, 167 U. S. 224-249, 17 Sup. Ct. 809, 42 L. Ed. 144."

[559] *Bloomer v. McQuewan*, 14 How. 539-549, 14 L. Ed. 532, is cited:

"The franchise which the patent grants consists altogether in the right to exclude every one from making, using, or vending the thing patented without the permission of the patentee. This is all that he obtains by the patent."



## Opinion of the Court.

The right of a patentee to suppress his own rests upon ordinary considerations of property right. The public has no right to compel the use of patented devices or of unpatented devices, when that is inconsistent with fundamental rules of property. When a patentee agrees, however, to restrain his own trade in the article of his own invention, not as an incident to a granting of rights, but for the purpose of enhancing his price by the removal of competitors, he is then quite outside the sphere of any right granted him by the government. He may engage in interstate trade or not as he pleases; but, being engaged in that trade, he is subject to all restrictions upon interstate traders.

That patented articles are an important factor in interstate commerce must be especially apparent to those who have been engaged in the administration of patent law. If they are within the ordinary signification of the broad terms of the Sherman Act, patented articles can be excluded only by showing some conflict or inconsistency between the patent law and the Sherman Act.

In *Bement v. National Harrow Company*, 186 U. S. 92, 22 Sup. Ct. 747, 46 L. Ed. 1058, the court was of the opinion that the statute does not refer to a restraint which may arise from reasonable and legal conditions imposed upon the assignee or licensee, restricting the terms upon which the article may be used and the prices to be demanded. The restraint which arises from joint agreements between independent patentees as to the course of conduct each will take results solely from voluntary contract, and in no sense from the exercise of rights granted by letters patent. The patentee may grant to others rights otherwise denied them, and may limit those rights as he pleases. He may, by assignment of his exclusive rights, exclude himself; for the rights of exclusion granted by the patent are transferable. Has he, in spite of the Sherman Act, a full right to agree that neither he nor his assigns will compete with other persons, or that trade in his invention will be wholly or partly suppressed or restrained in order to enhance the profits of the trade of others in other competing articles, patented or unpatented?

It must be recognized that an inventor stands in a special relation to the product of his own faculties. When he has

## Opinion of the Court.

secured his patent, he may derive profit from an agreement not to use it. In the *Paper Bag case*, 210 U. S. 429, 28 Sup. Ct. 748, 52 L. Ed. 1122, there was involved the question whether a patentee who held his patent in nonuse had a standing in equity to restrain infringement. Upon facts presented in argument the court observed:

"It is disputable that the non-use was unreasonable or that the rights of the public were involved."

There are sound reasons for holding that the mere fact of non-use is insufficient for denying relief by injunction against infringement. While the Sherman Act cannot be so applied as to deprive the patentee [560] of the profits arising from the use of his invention by himself or others, or to deprive him of the right to make the usual restrictions necessary to preserve the value of the monopoly conferred by letters patent, yet a logical application of the proposition that all that letters patent convey is a right to exclude others, and to assign such a right of exclusion, leads to the conclusion that an agreement whereby the owner of the patent agrees to restrain his own trade may be as much within the prohibition of the Sherman Act as any other agreement of the same character.

It is a fact, familiar in commercial history, that patent rights have a commercial value for purposes of extinction; that many patents are purchased in order to prevent the competition of new inventions and of new machines with old machines already installed. The equitable status of an owner of a patent who has purchased and held it in non-use for this purpose is still an open question, and was not determined by the *Paper Bag Patent case*. An attempt to make profit out of letters patent by suppressing the invention covered thereby is outside the patent grant, and is so far removed from the spirit and intent of the patent law that the mere fact that an inventor may make a profit by suppressing his invention is not a sufficient reason for holding the Sherman Act inapplicable to agreements affecting patented articles. If there is secured to the patentee all profits legitimately arising from the manufacture, use, and sale of his invention, this is all that is within the terms of the grant. To prohibit contracts for

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the suppression or restraint of his own trade by the application of the Sherman Anti-Trust Act is not inconsistent with his right to manufacture, use, and vend. That the Sherman Act interferes with some supposed right, granted by the patent, to suppress an invention, is an unsound proposition, for the reason that letters patent grant no such rights, either in terms or by reasonable implication. When no question of the value of the right of excluding others is involved, I am unable to find in the patent law any reason for upholding an agreement for the suppression or restraint of trade in a patented article against the provisions of the Sherman Act.

Granting that non-use of an invention is fully within the right of the owner of a patent, it does not follow that he may by agreement bind himself to non-use, save in connection with an assignment of his letters patent. Ownership of a patent involves no obligation to use, nor does ownership of other property. Non-use ordinarily violates no law; but contracting with another, putting it in the power of another to compel one not to use, is a contract in restraint of trade, designed for the purpose of suppressing competition.

Section 4884 of the Revised Statutes (U. S. Comp. St. 1901, p. 3881) defines the nature of a right conferred upon the patentee. It is an assignable and heritable exclusive right to make, use, and vend. The profit which arises from suppressing an invention, from non-use, flows from commercial tactics, and not from the use of the invention. The public interest which forbids contracts in restraint of trade arises from no right in the public to create trade by compulsion, but only from the expectation of the ordinary course of conduct, and the harmful results of interference with it by monopolistic schemes.

[561] The inventor who has not patented his invention cannot make an agreement in restraint of interstate trade without violating the Sherman Act, even though he is in fact an inventor. The rules of public policy, expressed in the Sherman Act, apply to him, and I do not think are affected by his taking out a patent, save in the single particular of an assignment or license.

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The object of the constitutional provision upon the subject of patents, etc., was:

"To promote the progress of science and useful arts by securing for limited terms, to authors and inventors the exclusive right to their respective writings and discoveries."

The suppression of intellectual products for the preservation of the old market does not promote the progress of science and the arts. A patentee who agrees to suppress his invention is not promoting it. He is not deriving his profit from its promotion, but from manipulation of the market. It is no part of the constitutional scheme, or of the scheme of the patent laws, to secure to inventors a profit from the suppression of their creations. The true rule seems to me to be well expressed by Judge Seaman in *Indiana Manufacturing Company v. J. I. Case Threshing Machine Company* (C. C.) 148 Fed. 21-25:

"I am of the opinion that such combination must be limited to the express policy and object of the patent grant—monopoly in beneficial use of a specific invention—and when extended beyond that purpose by concert of action may thus be brought within the inhibition of the general law."

To limit the application of the Sherman Act merely because profits may be made by a patentee in the course of business strategy seems to me to be unsound, for the reason that it misinterprets the language of the patent law, and perverts its spirit, and excludes from the Sherman Anti-Trust Act a very considerable class of agreements which are quite as objectionable as agreements covering non-patented articles.

Is it possible that the manufacturers of automobiles, of typewriters, of shoe machinery, or spinning machinery, are without the scope of the Sherman Act for the reason that their machines generally "embody one or more patented improvements"?

Regard must be had to the actual conditions of interstate trade and to the general course of combination. The reasons for enacting the Sherman law seem quite as applicable to articles of this character as to articles having no connection with patents.

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The Sherman Act is not inconsistent with any rights acquired by the patentee when it prevents agreements in restraint of trade which are not designed to make valuable the right to use. There is no inconsistency between the grant of an exclusive and assignable right to make, use, and vend, and the prohibition of an agreement restraining or suppressing the sale of the article in interstate commerce, because any profit from such an agreement does not arise from the value of making, using, and vending. There is no inconsistency between the proposition that an inventor may withhold his invention from use as he sees fit, and the proposition that he may not make an agreement whereby, for the advantage of a competitor, trade in his patented article is restrained or suppressed.

[562] Though an invention may be suppressed by the patentee or his assignee, yet the fact that there are now two ways of suppressing a patent is no reason for disregarding a statute designed to prevent a third way.

In the consideration of this case I have dwelt principally upon the broad contention that the Sherman Anti-Trust Act has no application to patented articles. It seems quite clear that an agreement in restraint of trade, though it relates to patented articles, may tend to create a monopoly which is different from that conferred by grants of letters patent.

Combinations between owners of independent patents, whereby, as part of a plan to monopolize the commercial field, competition is eliminated, are within the Sherman Act, for the reason that the restraint of trade or monopoly arises from combination, and not from the exercise of rights granted by letters patent. As by the terms of the contracts under consideration the owners of distinct patents each agreed to restrain its own interstate trade, I am of the opinion that the contracts are in these particulars obnoxious to the Sherman Anti-Trust Act.

I am further of the opinion that upon the present bill, which is a bill for the enforcement of the provisions of an unlawful contract, no relief of other nature can be granted.

The demurrer is sustained.

## Syllabus.

**[820] AMES v. AMERICAN TELEPHONE & TELEGRAPH CO.**

(Circuit Court, D. Massachusetts. January 14, 1909.)

[166 Fed. Rep., 820.]

**CORPORATIONS (§ 202)—ACTION BY STOCKHOLDER—INJURY TO CORPORATION.**—The declaration alleged that the T. Telegraph Co., in which plaintiff was a stockholder, was organized to operate an independent system throughout the United States, after which the defendant company secured control of the T. Co. by the purchase of its stock, to prevent competition in interstate telephone traffic, which it had planned to carry on. Defendant since so managed the T. Co. as not to develop its business, but to prevent it from doing business, and suppressed competition, until the T. Co. was forced into the hands of a receiver. By such control defendant had monopolized interstate telephone commerce, and thereby rendered worthless plaintiff's stock in the T. Co., which prior thereto had been worth \$15 a share. *On demurrer, held*, an injury to the corporation, and [821] not to the stockholders of the T. Co., and that plaintiff could not therefore sue in his own name to recover treble damages under the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, § 7, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]), giving a right to recover threefold damages to any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by such act.\*

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 202.]

**PLEADING (§ 216)—DEMURRER—PROOF.**—The possibility that proof may be introduced at the trial of an injury other than that alleged in the declaration will not require the overruling of a demurrer thereto.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 216.]

**CORPORATIONS (§ 211)—INJURY TO CORPORATION—DAMAGES—DECLARATION.**—Where, in an action by a stockholder of a corporation against defendant, the only injury alleged was to the corporation, a general averment that plaintiff had been greatly injured in his business and property was insufficient as an allegation of injury to plaintiff distinct from that to the corporation.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 211.]

**CORPORATIONS (§ 560)—RECEIVERS—INJURY TO CORPORATION.**—Where a corporation is in the hands of a receiver, an action for injuries to the corporation should be prosecuted by him for the benefit of the corporation's creditors.

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[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 560.]

*Whipple, Sears and Ogden and William F. Poole*, for plaintiff.

*Storey, Thorndike, Palmer and Thayer*, for defendant.

BROWN, District Judge.

The declaration is framed in reliance upon the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, § 1, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), and claims threefold damages under that act.

The declaration avers in effect that the plaintiff is the owner of shares of the capital stock of the Telephone, Telegraph & Cable Company of America, organized to operate an independent telephone system throughout the United States; that the defendant, the American Telephone & Telegraph Company, secured control of the Telephone, Telegraph & Cable Company by the purchase of shares of its stock. The principal allegation requiring consideration is the following:

"The plaintiff avers that the defendant purchased said shares and secured said control for the purpose of preventing the free operation of competition in the interstate telephone traffic and commerce which said company had planned to carry on, and in the attempt to monopolize such commerce; that said cable company has since been managed by the nominees of the defendant and its agent, the said Morse, not for the purpose of developing the business for which said company was organized, but for the purpose of preventing said company from doing business, and thus suppressing and smothering the competition which it would otherwise cause to the business of the defendant, until now the company is in the hands of a receiver; and that by the exercise of its control of said cable company the defendant has, in fact, since monopolized such interstate telephone commerce."

It is alleged that the plaintiff's injury was rendering worthless his shares of stock of the cable company. The principal question upon [822] demurrer is whether the declaration sets forth any injury to the plaintiff resulting in a special damage peculiar to himself and distinguishable in kind from that which he shares with all other shareholders as a result of an injury to the corporation in its business or property.

## Opinion of the Court.

Assuming merely for purposes of decision upon demurrer that the declaration alleges a violation of the Sherman Act, and that it properly alleges consequent damage, I am of the opinion that the injury set forth is to the corporation, for which the corporation alone can maintain an action at law under the Sherman Act. Section 7 of that act gives a right to recover threefold damages to—

“any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act,” etc.

The business which it is alleged was injured was that of the Telephone, Telegraph & Cable Company of America, and not of the plaintiff. Can it be said that the injury which the plaintiff has suffered by the depreciation of the value of his shares constitutes such an injury in his property that it is distinguishable from the injury to the corporation? The right of a stockholder to maintain an action at law for injury suffered by the corporation was carefully considered by Chief Justice Shaw, in *Smith v. Hurd et al.*, 12 Metc. (Mass.) 371, 46 Am. Dec. 690. In this opinion it is recognized that to the extent of his separate and peculiar interest a stockholder may maintain his separate and special action. It is said, however:

“But an injury done to the stock and capital, by negligence or misfeasance, is not an injury to such separate interest, but to the whole body of stockholders in common. It is like the case of a common nuisance, where one who suffered a special damage, peculiar to himself, and distinguishable in kind from that which he shares in the common injury, may maintain a special action.”

A later case, *Converse v. United Shoe Machinery Company*, 185 Mass. 422, 70 N. E. 444, reaffirms the doctrine of *Smith v. Hurd*, and is in point upon the question whether this declaration sets forth any special injury to the plaintiff which is distinguishable from the alleged injury to the corporation. The language of the court is as applicable, I think, to the declaration in the present case as to the similar declaration then before the court:

“All the wrongs done or intended, set out in the declaration, are wrongs against the corporation in which the plaintiff is a stockholder, and except through the corporation they have no relation to the



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plaintiff. She was not affected by the defendant's conduct, except as every other stockholder was affected. Against her as an individual there was no conspiracy, and against her as an individual no wrong was done directly. There is no direct legal privity between her individually, or as a stockholder, and these defendants."

The Sherman Act does not by its terms affect the question whether an injury is in legal contemplation an injury to the corporation or an injury to the stockholder. This question must be determined upon ordinary principles of law. There can be little doubt that the ordinary principle of representation of the stockholders by the corporation is as applicable to a violation of the Sherman Act as to any other violation of law. There is no indication of an intention of Congress to sub[823]ject a defendant to independent suits by a multitude of stockholders for an act for which the statute affords redress to the corporation itself.

The corporation has a right of action, and to so interpret the act as to confer a right of action upon the stockholder also, upon the present declaration, would be in effect to subject the defendant not merely to treble damages, but to sextuple damages, for the same unlawful act. The plaintiff's brief does not make satisfactory answer to this point. It is suggested by the plaintiff:

"If the corporation should also at some later time sue and recover the fact of the plaintiff's earlier recovery should be considered in estimating the damages to be paid to the corporation."

The declaration alleges that the cable company is now in the hands of a receiver. It follows that upon recovery of damages for an injury to the corporation the fund belongs to the receiver for application to the obligations of the corporation. These obligations take precedence over the interest of the shareholder. The prior recovery by a shareholder, if permitted to diminish recovery by the receiver, would result in depriving creditors of the corporation, if there are any, of the assets properly belonging to them. Moreover, the assets of the corporation are subject to disposal by proper corporate action, and the individual stockholder has no rights inconsistent with this right of the corporation.

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The allegation of damage to the plaintiff is that:

"He has been greatly injured in his business and property, in that his said shares of stock which were worth, as the plaintiff avers, \$15 per share, at the time of purchase of stock by the defendant, have now been rendered worthless."

Plaintiff argues that, as the declaration contains no averment that the company lost its assets, it is perfectly conceivable that the stock of the company might become practically worthless, though its assets were not directly affected, if its officers insisted upon a policy of doing no business and paying no dividends.

It is further suggested that:

"If absolute injustice is not to be done by denying this plaintiff the right to maintain his suit, the court is required to rule that in no conceivable way and under no conceivable form of proof could he show that the value of his stock was affected in the slightest degree differently from the way that damage was done to the corporation. If there is any difference at all in the nature of the damage, then the demurrer should be overruled, and the case should be tried on issues of fact under the proper guidance of the court."

The possibility that at the trial proof may be introduced of an injury other than that alleged in the declaration is not a good reason for overruling the demurrer. The only injury set forth is an injury to the corporation. No facts are stated which show an injury to the plaintiff distinct from that to the corporation, and the possibility of proof thereof at a trial, therefore, cannot be considered upon demurrer. Such a general averment as that "the plaintiff has been greatly injured in his business and property" cannot support the introduction of testimony showing a different cause of action from that of which [824] the defendant is given notice by the declaration. The plaintiff must set out the facts from which it appears that he has suffered a peculiar and individual injury.

Granting that the value of corporate stock is dependent, not only upon assets in possession, but upon the expectation of profits to be realized through conduct of the corporate business, the shareholder has no special interest, distinct from that of the corporation, in such profits. If damages are recoverable for the destruction of provable future profits,

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the corporation or its receiver, and not the stockholder, would be entitled to such damages. *Porter v. Sabin*, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815.

It is not necessary, however, to speculate as to the possibilities and as to the conceivable right of stockholders to maintain individual actions. It is enough to say that the wrongs here alleged are to the corporation, that to admit any other line of proof would be to go outside of the declaration, and that the proper guidance of the court should be exercised, not in distinguishing relevant and irrelevant issues at the trial, but by rulings on demurrer which will determine the orderly course of the trial.

The facts in the case of *Metcalf v. American School Furniture Company* (C. C.) 108 Fed. 909, are substantially different. There is no careful consideration in that case of the question of representation of the stockholder by the corporation in suits under the Sherman Anti-Trust Act. The decision is confined to the ground of multifariousness. The affirmation of this decision by the Circuit Court of Appeals in 113 Fed. 1020, 51 C. C. A. 599, amounts to nothing more than an affirmation of the decision that the claim for triple damages under the Sherman Act could not be joined with a stockholders' bill. The court observes that:

"Section 7 of the federal act of 1890 is declaratory of a common-law right which existed in favor of parties injured by wrongs enumerated in other sections of that act, and confers jurisdiction to seek a remedy, and with treble damages, in a federal tribunal. The character of the right of action is in no way changed, and still remains one in tort."

This is inconsistent with the contention that the Sherman Act has the effect of changing the ordinary rule that the corporation represents the stockholder in wrongs done to the corporation. The plaintiff does not contend that the right of action for treble damages is given to the stockholder and denied to the corporation. A construction of the act which makes the defendant liable to sextuple damages is certainly to be avoided. The asserted right of the stockholder is inconsistent with the right of the corporation to maintain suit upon the facts alleged in the declaration.

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In *Pennsylvania Sugar Refining Company v. American Sugar Refining Company* (C. C.) 160 Fed. 144, a similar action was brought, not by a stockholder, but by the corporation. The complaint was dismissed by the Circuit Court on the authority of *United States v. E. C. Knight Company*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325. A recent press report states, however, that this decision was reversed by the United States Circuit Court of Appeals for the Second Circuit and the right [825] of the corporation to maintain suit was apparently affirmed. 166 Fed. 254.

The plaintiff contends that, if it be true that the corporation and not the stockholder is the proper party to bring suit, it then follows that the stockholder has no remedy at all, for the reason that several cases have decided that a private individual cannot sue in equity under the Sherman Act, and that the only remedy is at law. The cases of *Pidcock v. Harrington* (C. C.) 64 Fed. 821, *Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co.*, 86 Fed. 407, 30 C. C. A. 142, and *Southern Indiana Ext. Co. v. U. S. Exp. Co.* (C. C.) 88 Fed. 659, do not touch the question of the rights in equity of a stockholder upon a refusal of a corporation to maintain an action at law for damages under the Sherman Act. A bill in equity based upon this ground would be substantially different from the suits in equity above referred to. The possibility that the stockholder might be deprived of some right through the failure or refusal of the corporation to take the proper steps to enforce its rights is not a sufficient reason for disregarding the doctrine of *Smith v. Hurd*, and *Converse v. United States Shoe Machinery Company*. See *Porter v. Sabin*, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815.

The cable company being in the hands of a receiver, there should be little practical difficulty in working out the stockholder's right through directions to the receiver as to suits upon causes of action belonging to the corporation.

The defendant contends, further, that the declaration shows no breach of the Sherman Act resulting in damage to any one. A decision of this question involves a careful consideration of a number of decisions, some of which were not discussed at the argument.

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I am of the opinion that a consideration of this point is unnecessary, in view of what seems to me the vital objection to the maintenance of a suit by a stockholder upon the present declaration.

Demurrer sustained.

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[825] BREED v. AMERICAN TELEPHONE & TELEGRAPH CO.

(Circuit Court, D. Massachusetts. January 14, 1909.)

[166 Fed. Rep., 825.]

On Demurrer to Declaration.

*Whipple, Sears and Ogden and William F. Poole, for plaintiff.*

*Storey, Thorndike, Palmer and Thayer, for defendant.*

BROWN, District Judge.

It is admitted by the plaintiff that the questions arising upon the demurrer are substantially the same as those in the case of *Oakes Ames v. American Telephone & Telegraph Company*, 166 Fed. 820, in which an opinion has been passed down this day. The defendant's brief points out that the present case differs from the *Ames* case in that Breed was not a shareholder in the Telephone, Telegraph & Cable Company of America, but a shareholder in the Boston & New York Telephone Company, in which the Cable Company owned a majority of the shares.

The reasons given in the opinion in *Ames v. this defendant* apply with at least equal force to this declaration.

Demurrer sustained.

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[704] BIGELOW v. CALUMET & HECLA MINING CO.  
ET AL. (two cases).<sup>a</sup>

(Circuit Court, W. D. Michigan, N. D. October 3, 1908.)

[167 Fed. Rep., 704.]

CORPORATIONS (§ 377)—POWERS—PURCHASING STOCK IN OTHER CORPORATIONS—MICHIGAN MINING STATUTE.—A mining corporation of Michigan may exercise the power to purchase stock of other similar corporations conferred by Pub. Acts Mich. 1905, p. 153, No. 105,

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<sup>a</sup> For prior opinion of Circuit Court (155 Fed. Rep., 869). See *ante*, p. 293. For opinion Circuit Court of Appeals, Sixth Circuit (167 Fed. Rep., 721) see *post*, p. 618.

## Syllabus.

although its articles of incorporation do not in terms include such power, the state laws under which it was organized and by which it is governed being expressly subject to amendment or alteration under Const. Mich. art. 15, § 1; and the acceptance of the statutory amendment is sufficiently expressed by the exercise of the power given by the amendment.<sup>a</sup>

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1531; Dec. Dig. § 377.]

Acquisition by corporation of stock of other corporation, see note to *Anglo-American Land, Mortgage & Agency Co. v. Lombard*, 68 C. C. A. 120.]

**CORPORATIONS (§ 377)—POWERS—HOLDING STOCK IN OTHER CORPORATIONS.**—Pub. Acts Mich. 1905, p. 153, No. 105, which authorizes corporations organized under the mining laws of the state to purchase the stock of any other corporation organized thereunder, does not limit the purpose of such purchases, and the purchasing company may exercise all the lawful rights of a stockholder, including voting the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1531; Dec. Dig. § 377.]

**MONOPOLIES (§ 12)—COMBINATIONS IN RESTRAINT OF TRADE—INTENTION OF PARTIES.**—In determining whether a transaction constituted an illegal contract, combination, or conspiracy in restraint of interstate trade or commerce, or to monopolize the same in violation of the Sherman Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), the intention of the parties may or may not be material, depending on whether or not the necessary effect of the agreement or acts done is to directly restrain such trade or to create such monopoly. If not, the intention is important.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

**MONOPOLIES (§ 12)—COMBINATIONS IN RESTRAINT OF TRADE—FEDERAL STATUTE.**—A combination is not illegal as in violation of the Sherman Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), merely because it may indirectly, incidentally, or remotely restrain interstate trade or tend toward monopoly, if its main purpose and chief effect are to [705] promote the business and increase the trade of the parties in a legitimate way.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

**MONOPOLIES (§ 20)—COMBINATIONS IN RESTRAINT OF TRADE—COMBINATIONS BY MINING CORPORATIONS.**—The securing by one copper mining corporation, through stock purchases authorized by the laws of the state and proxies obtained from other stockholders, of con-

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<sup>a</sup> Syllabus copyrighted, 1909, by West Publishing Company.

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trol over a competing corporation owning and operating adjacent mines, does not necessarily restrain interstate trade or create a monopoly in violation of the Sherman Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), although it is the intention to place the two corporations to a large extent under a common directorate and general control; and such purchase will not be held illegal under the statute because of such facts, where its primary purpose is to secure through friendly co-operation and the joint use of facilities a more economical operation of the mines, especially where the controlled corporation is one of a group previously under a common control and management, and whose products were sold through a common agency; nor does the fact that such purchase will result in the transfer of such agency as to its product to that of the purchasing company tend to unlawfully restrain competition.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 20.]

**MONOPOLIES (§ 20)—COMBINATIONS IN RESTRAINT OF TRADE—COMBINATIONS BY MINING CORPORATIONS.**—Lake Superior copper of the grade known in the market as "Best Lake" copper is not so distinct from Western copper as a commercial product as to render a combination between two or more of the few companies producing the same unlawful as a monopoly or attempted monopoly of such Best Lake copper, in view of the recently employed process of electrolytic refining which has practically, and to a large extent commercially, eliminated the difference between the Lake and Western products.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 20.]

**MONOPOLIES (§ 20)—COMBINATIONS IN RESTRAINT OF TRADE—MICHIGAN STATUTES.**—The purchase by one mining corporation of a controlling interest in the stock of another competing corporation held, under the evidence, not unlawful as in violation of Pub. Acts Mich. 1899, p. 409, No. 255, which prohibits combinations for the purpose of preventing competition in "manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity," or of Pub. Acts Mich. 1905, p. 507, No. 329, which declares illegal all combinations entered into "for the purpose and with the intent of establishing and maintaining, or of attempting to establish and maintain a monopoly."

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 20.]

**MINES AND MINERALS (§ 105)—CORPORATIONS—POWERS—RESTRICTIONS AS TO REAL PROPERTY—MICHIGAN MINING CORPORATIONS.**—The land holdings of a Michigan copper-mining corporation, shown to require 30,000,000 feet of timber per year in its mines, held not so excessive as to be illegal under Pub. Acts Mich. 1907, p. 214, No. 162, relating to mines, which provides that "every corporation organized or existing under this act shall have the power to purchase, hold and convey all such real estate as the purposes of the corporation shall require."

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[Ed. Note.—For other cases, see Mines and Minerals. Cent. Dig. § 229; Dec. Dig. § 105.]

**MINES AND MINERALS (§ 105)—CORPORATIONS—POWERS—RESTRICTIONS AS TO REAL PROPERTY.**—In determining whether the land holdings of a mining corporation exceed the statutory limit, which is fixed at the amount the purposes of [706] the corporation shall require, lands owned by other mining corporations which it controls through stock ownership are not to be taken into account.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 229; Dec. Dig. § 105.]

For opinion of Circuit Court of Appeals affirming decrees, see 167 Fed. 721.

*Herbert E. Boynton and Arthur C. Denison*, for plaintiff.

*Allen F. Rees and Otto Kirchner*, for defendant Calumet & Hecla Mining Co.

*John E. More*, for defendant Osceola Consol. Min. Co.

**KNAPPEN**, District Judge.

In the opinion filed by this court upon the application for a preliminary injunction in the case first above entitled (*Bigelow v. Calumet & Hecla Mining Company* [C. C.] 155 Fed. 869), the claims of the complainant presented in that cause, as well as the conclusions reached upon the various legal questions there raised, are fully stated. The bill of complaint in the second cause contains, so far as material to this opinion, substantially the same allegations of fact and legal deductions therefrom as the bill in the first cause, except in certain respects to which attention is especially called in this opinion. Briefly summarized, both bills allege in substance that the purchase by the Calumet & Hecla Company of 22,671 shares of stock in the Osceola Company, and the obtaining of proxies in the interest of the Calumet & Hecla Company, for the voting of the stock of other shareholders in the Osceola Company, is an attempt on the part of the Calumet & Hecla Company to monopolize, in part, interstate commerce, in violation of the Sherman Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), to



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effect a combination for the purpose and with the intent of establishing and maintaining a monopoly of the business of mining, manufacturing, and selling copper, contrary to the Michigan statute against trusts and monopolies, and in violation of the common law relating to monopoly; that such action is part of the general plan of the Calumet & Hecla Company to secure control of practically the entire output of so-called "Lake copper," and thereby to secure a complete and absolute monopoly of such copper throughout the United States; that, in pursuance of said alleged unlawful plan, the Calumet & Hecla Company had also acquired a control of the stock in the Allouez and Centennial Companies (both alleged to be actively competing companies), and of stock interests in a large number of other companies, and was seeking to acquire further controlling holdings of stock in still other actively competing mining companies, notably the Tamarack, Ahmeek, and Isle Royale, which are operated in connection with the Osceola under complainant's management; that the action of the Calumet & Hecla Company in making such stock purchases and in procuring such proxies was ultra vires, illegal, and void; that the Calumet & Hecla Company has obtained and is holding lands greatly in excess of the 50,000 acres allowed by the mining law in force when the [707] bills were filed; that if the Calumet & Hecla Company shall secure the attempted control of the Osceola Company by the election of a board of directors, it can and will control the Osceola Company in the interest of the Calumet & Hecla Company, and not in the interest of complainant and other stockholders in the Osceola Company.

The bill in the first case (which was filed by complainant in virtue of his stockholding in the Osceola Company) asks an injunction against the voting, at the annual stockholders' meeting, on the part or behalf of the Calumet & Hecla Company, of the Osceola stock held by it, as well as the proxies held in its interest.

The bill in the second case (filed in virtue of complainant's ownership of a small amount of stock in the Calumet & Hecla Company, purchased after the commencement of the first suit, and for the purpose of protecting complainant's

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interest as an Osceola stockholder) asks a decree declaring the purchases of lands by the Calumet & Hecla Company in excess of 50,000 acres to be illegal, and that such excessive purchases be vacated; that the purchases made of stocks in other mining companies be declared illegal, and that steps be taken for the vacating of the same; that the Calumet & Hecla Company be enjoined from carrying out options and from paying assessments upon, and from purchasing or voting stock in, any other mining company, as well as from soliciting stock proxies in any competing mining company, and from voting stock or proxies before obtained in any such company, as part of a plan for acquiring the management and control of such company; and from buying or carrying out options for the purchase of further lands; and from arranging for joint operations between the Calumet & Hecla, Allouez, Centennial, and Osceola mines, including joint use of shafts; and from hauling, crushing, or smelting the products thereof by the railroads, stamp mills or smelters of the Calumet & Hecla Company.

This court held, upon the motion for preliminary injunction in the first case, that the 1905 amendment to the Michigan mining law (Pub. Acts Mich. 1905, pp. 153, 154, No. 105) empowered the Calumet & Hecla Company to purchase stock in the Osceola and other companies, subject to the restriction that such purchase be not made with the intent and for the purpose of restraining trade or creating a monopoly; but that a control by way of stock purchase and proxies, if made for that purpose and with that intent, was a violation of the state and federal statutes, which were held broad enough to cover any means purposely adopted for, and manifestly adapted to, the accomplishment of the unlawful purpose; and that the prima facie case presented by the bill, and evidence by way of ex parte affidavits, justified preserving the existing status until full and final hearing upon the merits. The motion for injunction in the second case was never heard.

The conclusion heretofore reached as to the power of the Calumet & Hecla Company to make the stock purchases in question, except so far as prohibited by the anti-trust and

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anti-monopoly laws, state [708] or federal, must be adhered to. It is, however, urged by complainant that the exercise by the Calumet & Hecla Company of the power to purchase stock in other mining companies, given by the 1905 amendment to the mining act (Pub. Acts Mich. 1905, p. 153, No. 105), violates the contract between the Calumet & Hecla stockholders as expressed in their articles of incorporation, which do not in terms include such power. Assuming (but not holding) that complainant is entitled to raise the question, the proposition is not, in my judgment, sustainable. The power to make the statutory amendment in question is directly given by section 1, art. 15, of the Constitution of Michigan, which provides for the formation of corporations under general laws, and that "all laws passed pursuant to this section may be amended, altered or repealed." The stockholders are as much bound by this provision as if it had been contained in their articles of incorporation. *Attorney General v. Looker*, 111 Mich. 498, 69 N. W. 929; *Looker v. Maynard*, 179 U. S. 46, 21 Sup. Ct. 21, 45 L. Ed. 79; *Polk v. Mutual Reserve Fund Life Association*, 207 U. S. 310, 28 Sup. Ct. 65, 52 L. Ed. 222. It is doubtful whether this power to purchase stock in another corporation engaged in the same business was such a substantial departure from the purposes of the corporation as expressed in its articles as to require the express acceptance of the amendment by the corporation. *Louisville Trust Company v. Louisville, New Albany & Chicago Railway Company*, 22 C. C. A. 378, 75 Fed. 433, 448. But if such acceptance was necessary it was, in my judgment, sufficiently expressed by the adoption, after due notice, of a by-law conferring such power upon the directors, by corporate action had thereunder, in the purchase of the stock, and by the subsequent ratification thereof by the stockholders after due notice. *Zabriskie v. Cleveland, Columbus & Cincinnati Railway Company*, 23 How. 381, 396, 16 L. Ed. 488; *Louisville Trust Company v. Louisville, New Albany & Chicago Railway Company*, 75 Fed. 488, 22 C. C. A. 378; *Venner v. Atchison, Topeka & Santa Fé Railway Company* (C. C.) 28 Fed. 581, 587, 589.

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It is further urged that the statute should be construed as authorizing stock purchases for investment only, and not for control. Except so far as this proposition involves the question of conflict with anti-trust and anti-monopoly laws, it is without apparent force. Not only does the statute contain no express limitation to purchases for investment, but the object of the provision, which is apparently to further the active and profitable prosecution of the business of the purchasing corporation by way of holding interests in other corporations carrying on the same or a directly allied business, seems more consistent with the right of active participation in the affairs of the corporation whose stock is purchased than with a mere right of investment without such active participation. The right to vote the stock so purchased is expressly given by the Michigan mining act (2 Comp. Laws Mich. § 7002), and such right is incidental to the ownership of the stock. *Rogers v. Nashville, Chattanooga & St. Louis Railway Company*, 33 C. C. A. 517, 91 Fed. 312; *Taylor v. Southern Pacific Railway Company* (C. C.) 122 Fed. 147, 151.

[709] The contention that the acquiring and holding of the stock proxies in the interest of the Calumet & Hecla Company is beyond the power of that company cannot be sustained. The mining act (2 Comp. Laws Mich. § 7002) expressly provides that "stockholders may appear and vote in person, or by proxy duly filed, or by their duly constituted attorneys." No question of the right of the Calumet & Hecla Company to act as the attorney for a stockholder in the Osceola Company is involved, for the corporation does not attempt to so act. But no reason is apparent why a corporation shareholder should not have the same legal right as other shareholders to protect its interest, both by giving and soliciting proxies for effecting a lawful concert of action.

We are thus brought to the consideration of the question whose answer must control the disposition of the first case, viz., whether the purchase of the Osceola stock and the obtaining of the Osceola proxies by the Calumet & Hecla Company have the necessary effect, or were made and done with the intent, to restrain trade or create or maintain a monopoly within the meaning of the law.

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And, first, as to the Sherman Act. The sections involved here are section 1, which declares illegal "every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations"; and section 2, which declares it a misdemeanor to "monopolize or attempt to or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations."

It is important, at the outset, to consider the intent and purpose of the action complained of; for while it is not necessary to a violation of the act to show affirmatively a specific intent to restrain commerce or create a monopoly, provided such restraint or such monopoly be the direct, immediate, and necessary result of the combination (*United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 341, 17 Sup. Ct. 540, 41 L. Ed. 1007; *United States v. Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; *Chesapeake & Ohio Fuel Company v. United States*, 53 C. C. A. 256, 115 Fed. 610, 623), yet, as said by Mr. Justice Holmes in *Swift & Company v. United States*, 196 U. S. at page 396, 25 Sup. Ct. at page 279, 49 L. Ed. 518, "Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, a monopoly—but require further acts in addition to the mere forces of nature in order to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen;" and, as said by Mr. Justice Peckham in the *Joint Traffic Association* case, in commenting upon the decision in the *Trans-Missouri* case, "An unlawful intent in entering into the agreement was held immaterial, but only for the fact that the agreement did in fact and by its terms restrain trade."

In many of the leading cases, both under state statutes and the common law, the express intent to restrain trade or create a monopoly was treated as material, and in some cases controlling. Thus, in *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457, the [710] object of the organization of the Diamond Match Company, which was there held

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to be a monopoly, was stated to be "to monopolize and control the business of making all the friction matches in the United States and establish the price thereof." In *Dunbar v. American Telephone Company*, 224 Ill. 9, 79 N. E. 423, 115 Am. St. Rep. 132, the direct object of the purchase by the American Telephone Company (the so-called "Bell monopoly") was alleged to be to put the Kellogg Company out of business, or to so use and control it as to prevent rivalry in business and create a monopoly. In *Hunt v. Riverside Cooperative Club*, 140 Mich. 538, 104 N. W. 40, 112 Am. St. Rep. 420, the legality of defendant's undertaking was said "to be determined by ascertaining their central and controlling object," which was found to be to create a monopoly in favor of the plumber members.

The facts necessary to be considered in determining the intent and purpose with which the Calumet & Hecla Company made the purchases and entered upon the expansion policy in question are these: The mines of the Calumet & Hecla Company are upon the Calumet conglomerate and the Osceola and Kearsarge amygdaloid lodes, which underlie the surface in the order named. Until 1904 the Calumet & Hecla Company mined from the conglomerate lode only. Since that year about one-tenth of its output has been taken from the Osceola lode. Only about one-third of that lode (so far as developed on the Calumet & Hecla property) is said to be capable of profitable mining. Upon the Kearsarge lode the Calumet & Hecla Company has thus far done no profitable mining. The conglomerate rock mined by the Calumet & Hecla Company originally yielded 100 pounds of copper to the ton, but the percentage of copper has decreased with the depth at which the vein is mined, until now it yields but little more than 40 pounds. The testimony fairly indicates that the profitable life of the Calumet & Hecla Company, in mining upon the conglomerate lode, at the present rate of production, is about 15 years, and that when this lode is exhausted, unless considerably more territory is secured, the industrial life of the Calumet & Hecla Company will be greatly impaired, and several million dollars worth of equipment and plants rendered in large part valueless. Parts of

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the Kearsarge lode on the Calumet & Hecla property are barren, the workings of that company yielding from that vein an average of 17 to 18 pounds of copper per ton of rock. To produce the same output from the Kearsarge lode, the Calumet & Hecla Company must mine several times as much rock as on the Calumet conglomerate; and for the reason stated, and in order to use the existing large equipment and conduct mining operations with the present degree of profit, it would be necessary, in working the Kearsarge vein, to mine over a large territory at once.

The Osceola, Centennial, Allouez, and La Salle mines are upon the Kearsarge lode, the mines of the Osceola Company being also upon the Osceola lode. The Osceola Company has worked both the Osceola and Kearsarge veins, producing from both in 1906 about 18,500,000 pounds of copper. The Allouez and Centennial properties have never been fully developed, the former yielding in 1906 about [711] 3,500,000 and the latter about 2,500,000 pounds of copper. In the case of the other companies involved, development has in no case been carried to the point of profitable production. The Centennial immediately adjoins the Calumet & Hecla, a portion of the Osceola lies between and immediately adjoining the Centennial, and the Allouez and another portion of the Osceola lie between and immediately adjoining the Calumet & Hecla and the La Salle, in which the Calumet & Hecla Company has acquired a controlling interest. The Kearsarge lode can be most advantageously worked by the Calumet & Hecla Company, through friendly cooperation with the Osceola, Centennial, Allouez, and La Salle mines, not unusual between mining companies sustaining friendly relations toward each other. Certain abandoned shafts of the Osceola Company are thought by the Calumet & Hecla Company to be available for mining the Osceola amygdaloid lode as well as the conglomerate lode of the Calumet & Hecla property, and certain shafts of the Osceola Company it is thought may ultimately be profitably extended into the Allouez and Centennial workings, and certain shafts upon other properties in which the Calumet & Hecla Company is interested it is believed can be advantageously used in the Osceola

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Company's territory. The relations between the Calumet & Hecla and the Osceola Companies were not such as to permit cooperation.

Copper production in the Lake region has steadily increased for many years past. In 1906 there were at least 22 producing companies in that region. At least 13 other mining companies were then developing and exploring. The copper-bearing range contains other profitable lodes besides those before named, including the Pewabic (on which the Quincy operates), the Arcadian (worked by the Isle Royale), and the Baltic (on which the Copper Range mines are operated). The Calumet & Hecla ratio of production toward the total Lake production has gradually declined from about 66 per cent in 1879 to 38 per cent in 1905, increasing to about 43 per cent in 1906.

I am convinced, from a careful consideration of the testimony, that the controlling motive and purpose of the Calumet & Hecla Company in acquiring its interest in the mining properties mentioned was to extend its industrial life and keep up and increase, if possible, its production and net earnings, and that the evidence fairly negatives a design thereby to reduce the output of any of the companies, or artificially to increase or maintain the price of the product, or to stifle competition between the related companies, or to prejudice other stockholders generally of either company associated, or to interfere with the integrity of either company, a common management with separate detailed organization being contemplated. The evidence does not indicate that any use of the facilities of the associated companies is contemplated, except upon terms and in manner mutually advantageous. The testimony indicates that the stock of the Osceola, Allouez, and Centennial Companies was bought on the exchange, as the only practicable method of procuring control of those properties; the legislative bill of 1905, authorizing the purchase of stock in other mining companies, having been introduced at the instance of the Calumet & Hecla Company.

[712] The allegation in the bill that the Calumet & Hecla Company was seeking to purchase interests in the Tamarack, Ahmeek, and Isle Royal Companies is not sustained by the



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evidence, except to this extent: that the Calumet & Hecla Company made an offer for the holdings of complainant and his associates, but only after complainant (having reason to suspect that the Calumet & Hecla Company was buying Osceola stock to obtain control) offered the same for sale, conditioned upon receiving the assurance that the Osceola stock was being bought for control. While this assurance was not given, the fact was neither admitted nor denied.

It is only just to complainant to say that the charges made against his management of the Osceola Company, to the effect that its product has not been economically manufactured and sold, and that it has not been made to bring the best prices, are shown to be without foundation.

A consideration of the evidence has failed to convince me that the Calumet & Hecla Company is seeking to restrain trade or create a monopoly, unless such monopoly or restraint of trade shall be found to be the necessary result of the control in question over the competing companies involved.

We are thus brought to the question whether the necessary effect of the alleged combination is to restrain trade or create a monopoly. It is settled that a combination does not violate the federal statute merely because it may indirectly, incidentally, or remotely restrain trade or tend toward monopoly. If its necessary effect is to stifle or to directly and substantially restrict interstate commerce, it falls under the ban of the law. On the other hand, if it only incidentally or indirectly restricts competition, while its main purpose and chief effect are to promote the business and increase the trade of the consumers, it is not denounced or voided by that law. *United States v. E. C. Knight Company*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; *Hopkins v. United States*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290; *Anderson v. United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300; *Whitwell v. Continental Tobacco Company*, 60 C. C. A. 290, 125 Fed. 454, 64 L. R. A. 689; *Chesapeake & Ohio Fuel Company v. United States*, 53 C. C. A. 256, 115 Fed. 610, 622; *Davis v. A. Booth Company*, 65 C. C. A. 269, 131 Fed. 31; *Phillips v. Iola Portland Cement Company*, 125 Fed. 593, 594, 595, 61 C. C. A. 19.

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Is, then, the direct and immediate and necessary effect of the mere fact of control on the part of the Calumet & Hecla Company over the Osceola Company (as obtained by the election of a majority of the board of directors, and thus the power to direct the affairs of the latter company, through the election of officers and otherwise) to restrain trade or create a monopoly within the meaning of the Sherman act?

In *United States v. E. C. Knight Company*, *supra*, it was broadly held that a monopoly of manufacturing was not within the prohibition of that law. There the American Sugar Refining Company, being in control of a large majority of the manufactories of refined sugar in the United States, acquired, through the purchase of stock in four Philadelphia sugar refineries, such disposition over those manufactories throughout the United States as gave it practically a monopoly [713] of the business. It was held that it does not follow that an attempt to monopolize, or the actual monopoly of the manufacture, was an attempt to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. Chief Justice Fuller there said (page 16 of 156 U. S., page 255 of 15 Sup. Ct. [39 L. Ed. 325]):

"Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination, or conspiracy."

It is urged, however, that the authority of the *Knight case* has been destroyed by subsequent decisions of the Supreme Court. Apart from this question, an examination of the later decisions which are thought to have that effect is of value; for in each of the cases so cited, and in which the effect of the combination in question has been held to be to restrain trade or create monopoly, there is found to have existed some special element (apart from the mere combination of manufacturing companies selling their product in interstate and foreign trade) from which a direct, immediate, and necessary restraint upon competition was found to result.

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Thus: By the agreement in question in *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, the adoption of governing rates for all companies interested was directly provided for, and this was the announced purpose of the combination.

In *United States v. Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259, the facts were similar to those in the *Trans-Missouri case*. In the *Joint Traffic case*, Justice Peckham said:

"To suppose, as is assumed by counsel, that the effect of the decision in the *Trans-Missouri case* is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption, and one not called for or justified by the decision mentioned, or by any other decision of this court."

In *Addyston Pipe Company v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, the defendants, who were manufacturers of cast iron pipe, entered into a combination to "raise the price of pipe for all the states west of New York, Pennsylvania, and Virginia, constituting considerably more than three-quarters of the territory of the United States," by "voluntarily agreeing to sell only at prices fixed by their committee"; whereby the defendants were able to "compel the public to pay an increase over what the price would have been if fixed by competition between the defendants." Justice Peckham there said of the *Knight case*:

"The plain distinction between manufacture and commerce was pointed out, and it was observed that a contract or combination which directly related to manufacture only was not brought within the purview of the act, although, as an indirect and incidental result of such combination, commerce among the states might be thereafter somewhat affected."

[714] In *Montague v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608, the Tile, Mantel & Grate Association involved had been organized for the express purpose of creating a monopoly between dealers within a certain radius and the eastern manufacturers of tile. By reason of the association, plaintiffs were wholly unable to procure at any price tiles from the manufacturers (from whom they had always before

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bought), or from dealers in San Francisco unless at a price more than 50 per cent above what members of the association were to pay.

In *Swift & Company v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, the case was heard upon demurrer to the bill, which charged a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against, or only in conjunction with, each other, in order to regulate prices in, and induce shipments to, the live stock markets in other states, to restrict shipments, establish uniform rules of grading, make uniform and improper rules of cartage, and to get less than lawful rates from railroads to the exclusion of competitors, with the intent to monopolize commerce among the states. Mr. Justice Holmes, in holding the combination invalid, said, with reference to the alleged restraint of interstate commerce, that:

It "is a direct object, it is that for which the several specific acts and courses of conduct are done and adopted. Therefore the case is not like *United States v. E. C. Knight Company*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, where the subject-matter of the combination was manufactures, and the direct object monopoly of manufacture within a state. However likely monopoly of commerce among the states in the article manufactured was to follow from the agreement, it was not a necessary consequence nor a primary end. Here the subject-matter is sales, and the very point of the combination is to restrain and monopolize commerce among the states in respect of such sales."

In *Northern Securities Company v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, the combination embraced competing or parallel lines of railroad. These railroads were directly engaged in commerce between the states, and the agreement provided for a prorating of the earnings between the two companies involved, thus effectually restraining competition.

Turning to the cases elsewhere, in which the direct and necessary effect of a given combination has been held to be to restrain trade, there is found to have existed some special element or consideration, apart from the mere combination of manufacturing companies, from which a direct, immediate, and necessary restraint upon competition was held to result.

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For example, in *Chesapeake & Ohio Fuel Company v. United States*, 58 C. C. A. 256, 115 Fed. 610, 14 coal producers of a given district, formerly independent, were compelled to sell at a price fixed by the executive committee or not to sell at all. The executive committee also determined each month what percentage of the total product each member might ship. The rule was expressly recognized that it is not every case of incidental restraint which makes a contract void, the court saying: "But the question is, is it an effect of the contract to directly restrain interstate commerce?"

In *Cravens v. Carter-Crume Company*, 34 C. C. A. 479, 92 Fed. 479, [715] a combination of manufacturers of woodenware, representing 80 per cent of the production of the country, was formed for the purpose of restricting production and keeping up prices, which were to be regulated by the central organization. The direct purpose was held to be to create a monopoly and restrain freedom of commerce.

It is urged that certain remarks found in the opinions of the courts in the *Pearsall*, *Great Northern*, *Trans-Missouri*, *Northern Securities*, *Addyston*, and other cases sustain the proposition that a control by one corporation over a competitor creates the tendency and the power to suppress competition, and that this tendency and power operate *ipso facto* as a direct and immediate restraint upon trade and in the direction of monopoly. The *Pearsall* case (161 U. S. 646, 16 Sup. Ct. 705, 40 L. Ed. 838) involved the question of fact whether certain acts amounted to a consolidation, lease, purchase, or any form of control on the part of the Great Northern over the Northern Pacific, and thus violated a statute of Minnesota forbidding railroad corporations to "consolidate with, lease, or purchase, or in any way become owner of or control any other railroad corporation, or any stock, franchise or rights or property thereof, which owns or controls a parallel or competing line." The nature of the other cases referred to has been already stated. Considering the remarks referred to in connection with the light of attending facts and the points decided, I find nothing in them sustaining the proposition that the direct, immediate, and necessary effect of a control by a corporation over a competitor, through

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stock ownership, is to restrain trade or create a monopoly either in manufacturing or selling. On the other hand, it is well settled that individual stockholders may lawfully own a controlling interest in each of two competing companies (*Pearsall v. Great Northern Railway Company*, 161 U. S. 646, 671, 16 Sup. Ct. 705, 40 L. Ed. 838; *Northern Securities Company v. United States*, 193 U. S. 361, 362, 24 Sup. Ct. 436, 48 L. Ed. 679), and that the same person may as director lawfully represent two competing companies (*Adams Mining Company v. Senter*, 26 Mich. 73; *Twin-Lick Oil Company v. Marbury*, 91 U. S. 587, 23 L. Ed. 328). The fact that Calumet & Hecla officers or representatives are to act as directors in the Osceola Company, whose corporate organization and affairs are to be separately maintained and conducted, affords no presumption that such directors will violate the law or abuse their trusts as directors of the Osceola Company. Any attempt to do so, will, of course, subject them to restraint or correction by the courts. *Rogers v. Nashville, O. & St. L. Ry. Company*, 91 Fed. 313, 33 C. C. A. 517. Beyond such indirect restraint as is incidental to a common management, it is difficult to see that competition will be necessarily unlawfully restricted. It is true that an opportunity for restricting competition is afforded by the relation; but this is equally true of every case of a common general management; true, for example, of the relations between the Osceola, Tamarack, Ahmeek, and Isle Royale Companies, which have in complainant a common president, who is largely interested as a stockholder; which have a common general management and control; and which own stock in a common smelter, railroad, and chemical works, and sell through a common [716] agent. In either of the cases presented, "further acts in addition to the mere forces of nature" are required to bring about the restraint of competition beyond such restraint as indirectly, remotely, and incidentally results from the relation of a common management. The practical certainty that under the proposed control the selling of the Osceola product would be taken from the United States Metals Selling Company, and will be sold in connection with that of the Calumet & Hecla Company, and thus under a general Calumet & Hecla

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management, is urged as necessarily restricting competition. But not only does not the employment of a common selling agent necessarily tend of itself to restrain trade (*United States v. Joint Traffic Association*, 171 U. S. 567, 19 Sup. Ct. 25, 43 L. Ed. 259), but it would seem that any decrease of competition between the Calumet & Hecla and the Osceola Companies is likely to be offset by new competition between the Osceola on the one hand, the Ahmeek and Tamarack on the other, and by new competition between the Osceola and the United States Metals Selling Company, which now sells two-thirds of the copper product of the United States, including the large output of the competing Amalgamated Copper Company. The conclusion reached is that, whatever may be the remaining authority of the *Knight case* as distinguishing between a monopoly of manufacturing and a monopoly of interstate selling, the authorities do not go to the extent of holding that in the absence of intent, or of special features or conditions, every case of control by a manufacturing or a mining corporation over a competitor, through stock ownership and consequent direction of corporate management, creates per se, directly, immediately, and necessarily, a restraint upon trade; and I am not prepared to hold that such is its effect.

It is, however, earnestly and forcefully contended that Lake copper is a commodity so distinct from other copper, and so peculiarly in a class by itself, and that its production is so small and so necessarily limited, that a control by the Calumet & Hecla Company over the Osceola Company will directly and necessarily tend to substantially restrict competition and create a monopoly in Lake copper, and especially in what (as distinguished from Western or Electrolytic copper) is called "best" or "prime" Lake copper; which is alleged to be produced by only a few companies other than the Calumet & Hecla and Osceola (viz., the Quincy, Tamarack, Wolverine, and Ahmeek), and in comparatively small amounts.

It is well settled that a monopoly, in order to be unlawful, need not be complete; and that it may exist although limited to a narrow territory. A combination must, however, in order to violate the law against monopolies, directly, neces-

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sarily, and substantially tend toward monopoly. See *Whitwell v. Continental Tobacco Company*, 60 C. C. A. 290, 125 Fed. 454, 462, 64 L. R. A. 689, where the federal cases on the subject are discussed. As said in the *Addyston case* (page 245 of 175 U. S., page 109 of 20 Sup. Ct. [44 L. Ed. 136]):

"It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded."

[717] The important facts relating to this branch of inquiry are these: The record shows that the world's production of copper was in 1906 about 1,600,000,000 pounds, of which the United States was producing about 913,000,000 pounds. Of this last amount about 224,000,000 pounds were produced in the neighborhood of Lake Superior, and is therefore Lake copper. This Lake copper in place differs from most of the other world's copper in that it is "native"—that is to say, it is usually found "free" and substantially pure, the arsenic and other impurities being usually regarded as united with the rock with which the metal is associated; while in most other coppers the metal is carried by an ore, and is directly united with other chemical substances. Until recent years, practically all copper was entirely furnace refined, and by reason of the conditions named the impurities (the most prominent of which was arsenic) were more readily removed from the Lake copper, and a better product obtained than was commercially practicable in the case of copper ores generally. By reason of this fact, and the uniformity of the product of some of the best of the Lake mines, Lake copper acquired and has held a reputation superior to that of Western coppers. By the process of electrolysis, which has, during recent years, been generally employed in the refining of Western coppers, practically absolute purity of product is obtainable, and the production of pure copper is commercially practicable from ores and minerals too arsenical to permit profitably of a high degree of refining by the furnace process alone. As a result of the improvement of this process, much of the Lake copper



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is now refined electrolytically in whole or in part. The Calumet & Hecla Company refines its highest grade of mineral by the furnace method alone. The other grades are refined by treating a lower grade electrolytically (after first smelting), and mixing the electrolytic product with another grade of mineral not electrolytically treated. By this method the percentage of impurities in the mineral not electrolytically treated is diluted by the purer electrolytic product, the degree of purity being theoretically according to the ratio between the respective degrees of purity and the proportionate amount of the two elements of the mixture. Calumet & Hecla copper, however treated, is of the same grade, is entirely Lake copper, and is sold on the market as best Lake copper (and not as electrolytic), and at one price. The Osceola, Tamarack, and Ahmeek Companies, managed by complainants, mix their minerals with cathodes of Western copper produced by the Boston & Montana Company (one of the constituents of the Amalgamated Copper Company), usually in substantially equal proportions. The resulting product, which is thus practically double the amount of Lake copper used, is sold as Best Lake, and not as electrolytic (substantially one-half as the property of the Boston & Montana Company), although actually but about one-half Lake. Some of the other Lake coppers are treated electrolytically and sold as Best Lake. Of the 224,000,000 pounds now produced from Lake mineral, the Calumet & Hecla (95,000,000 pounds), Quincy (16,000,000 pounds), Osceola (18,500,000 pounds), Tamarack (10,000,000 pounds), and Ahmeek 3,500,000 pounds), are conceded to be Best Lake. The product of seven other mines, producing in the aggregate in 1906 about [718] 24,000,000 pounds, including the Centennial (2,225,000 pounds), and the Wolverine (10,000,000 pounds), are fairly shown by the testimony to be capable of being used for all purposes for which Best Lake copper is desired; and no reason is apparent why a large part, if not all, of the remaining Lake product, too arsenical to permit of high refinement by the furnace process alone, cannot be so refined by the use of the electrolytic process.

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The production, both of copper generally in the United States as well as at the Lake, has increased steadily year by year, that of the United States having increased from 230,000,000 pounds in 1889 to 913,000,000 pounds in 1906, and that of the Lake region from 80,000,000 pounds in 1889 to 224,000,000 pounds in 1906. By reason of the activity of mining in the Lake district, in the development of both old and new lodes, the production bids fair to increase for some years in the future as rapidly as in the past. Practically all domestic copper, except some of that produced at the Lake, and the bulk of all foreign copper, is electrolytically treated. The object of refining is to obtain purity of product, and the freer it is from arsenic the greater its conductivity. The presence of a small amount of arsenic slightly increases tensile strength. For these reasons copper wire, which consumes about one-half of all the copper used in the United States, is usually made from electrolytic copper, although for some purposes (and perhaps all) certain customers specify Best Lake, which usually, not being entirely electrolytically refined, is apt to carry a little more arsenic than the purely electrolytic. The testimony shows that there is no inherent chemical or physical difference between equally pure furnace refined and electrolytically refined copper, provided the latter is subjected to the same final furnace process, as the testimony indicates it usually is for commercial sale. Electrolytic copper is capable of use for any purpose for which Best Lake is used. Lake copper and electrolytic are sold in direct competition with each other, both in this country and abroad, the Best Lake usually selling, on a normal market, at an average of about one-quarter cent per pound in excess of the best electrolytic. The preference of some purchasers, which results in this difference in price, is probably due, in large part at least, to the long existing reputation of the Best Lake for excellence, including uniformity of product, and to the fact that the present high state of electrolytic refining has but lately been reached. Lake copper is not locally consumed or sold. With the improvements in the electrolytic process, and by care in refining, the preference of some consumers for Lake copper is diminishing, and seems likely to disappear in

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the near future, except so far as it may be based upon the reputation of individual producers. The United States government, which is a large purchaser of copper for various purposes, originally specified Calumet & Hecla alone for cartridge cases. It has lately included Osceola, Tamarack, and Quincy, and has still more lately indicated a willingness to consider the best electrolytic if conforming to tests sustained by samples submitted. The United States government uses for all purposes much less than the amount of the Calumet & Hecla output alone, and in the last five years that company has sold the government (directly at least) only about one million pounds in the aggregate. It would seem that any attempt to artificially raise the price of Lake copper as against electrolytic would be offset by a larger use of electrolytic.

If the distinction between Lake and electrolytic copper is as sharply defined as complainant claims (and as would seem necessary if the charge of monopoly in Lake copper is to be sustained), in view of the attitude of complainant toward Lake copper, as evidenced by his action in causing to be marketed annually over 60,000,000 pounds of copper as Lake copper, which is, in fact, to the extent of but about one-half the product of the Lake region, a serious question is raised as to his right to equitable relief against an attempted monopoly in real Lake copper. But it is unnecessary to decide this question, for the conclusion reached, upon consideration of the facts appearing in the record, is that neither Lake copper nor Best Lake copper is so far a distinct commodity, and so conspicuously in a class by itself, as to make the control by the Calumet & Hecla Company over the Osceola, Allouez and Centennial Companies directly, immediately, and necessarily tend toward restraint of trade or monopoly in Lake or Best Lake copper, either generally or against the United States government in particular. The alleged combination not being shown to be made with the intention, or to have the direct, immediate and necessary effect to restrain trade or create monopoly, a violation of the federal law is not, in my opinion, made out.

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## AS TO THE MICHIGAN STATUTES.

The only provisions which may plausibly be thought to be violated are subdivision 3 of the act of 1899 (Pub. Acts Mich. 1899, No. 255, p. 409), which denounces all combinations for the purpose of preventing competition in "manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity"; and section 2 of the act of 1905 (Pub. Acts Mich. 1905, No. 329, p. 507), which declares illegal all combinations entered into "for the purpose and with the intent of establishing and maintaining or of attempting to establish and maintain a monopoly" of any pursuit or business. The only material respect in which the Michigan statute differs from the federal law is that the Michigan act of 1899 expressly includes combinations in manufacturing. The conclusions reached with respect to the construction of the federal act necessarily forbid relief under the Michigan statutes. In view of the statutory provisions, both state and federal, it is unnecessary to further consider the question of common-law monopoly.

The conclusions reached require a denial of relief under the bill in the first case. The same considerations forbid relief under the bill in the second case, except as to the excessive land holdings; for the only producing mines which have come under the Calumet & Hecla control, aside from the Osceola, are the Centennial and Allouez; and their control has been taken into account in determining the lawfulness of the Osceola stock purchase.

A question is raised as to the right of complainant to relief against the acts complained of, in view of the object of his purchase and the [720] acquiescence of his assignors in the transactions with respect to which relief is sought. In the view, however, that is taken of the case upon the merits, it is unnecessary to consider this question.

The provisions of the mining act in force when these suits were begun (Pub. Acts Mich. 1907, No. 162, p. 214), provided that "every corporation organized or existing under this act shall have power to purchase, hold and convey all such real estate as the purposes of the corporation shall require."

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I am unable to assent to the proposition that the land holdings of corporations in which the Calumet & Hecla Company own a stock interest are to be taken into account in determining whether the statutory limit is exceeded. The Calumet & Hecla Company does not, by the mere fact of its stockholding, own lands held by another corporation. When these suits were begun, the Calumet & Hecla Company held over 65,000 acres of land, and owned in addition the timber on 40,000 acres. About 9,000 acres of timber has since been cut and the land allowed to revert. About 12,000 acres contained no timber. About 32,000 acres (containing pine timber too valuable for use in the mines) has been put upon the market for sale. The testimony is to the effect that the present Calumet & Hecla mining operations require about 30,000,000 feet of large timber per year, and that the 50,000 acres remaining are, in the judgment of the company's officers, sufficient only for the conglomerate mining.

Since these suits were begun, the provision referred to has been so amended as to give a mining corporation "power to purchase, hold and convey all such real estate as the purposes of the corporation shall require." Pub. Acts Mich. 1907, No. 162, p. 214. Passing the question raised as to the right of any one other than the public authorities to attack excessive land holdings, I am unable to say, under the evidence, that the judgment of the officers of the company has been wrongfully exercised, and that the Calumet & Hecla Company does not need the amount of land remaining on hand and not upon the market. In view of the amendment of 1907, the court could not properly, upon this record, order a reduction of land holdings, unless found to exceed the requirements of the corporation; and the fact that this statute was passed since the commencement of the suits could at most only affect the question of costs.

The option taken by the Calumet & Hecla Company upon the so-called "Nipagon lands," in Canada, is attacked as ultra vires. The above-cited provisions of the mining law pertaining to the holding of lands impose no limitation as to their location. The permission to purchase stock in other mining companies is expressly extended to "any company organized under this act or any other laws, foreign

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or domestic" (Pub. Acts Mich. 1905, pp. 153, 154, No. 153); and by 2 Comp. Laws Mich. § 7012, a mining company is expressly authorized to "conduct its mining, smelting or manufacturing business, in whole or in part, at any place or places within the United States, in the territories thereof or in any foreign country," and may conduct such business wholly without the state of Michigan. The Nipagon option is therefore not shown to be ultra vires.

The Calumet & Hecla Company is entitled to a decree in each case, dismissing the bill of complaint with costs.

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[721] BIGELOW v. CALUMET & HECLA MINING CO. ET AL. (two cases).<sup>a</sup>

(Circuit Court of Appeals, Sixth Circuit. February 18, 1909.)  
[167 Fed. Rep., 721.]

**MINES AND MINERALS (§ 105)—MINING CORPORATIONS—POWERS—PURCHASING STOCK IN OTHER CORPORATIONS—MICHIGAN MINING STATUTE.**—Public Acts Mich. 1905, p. 153, No. 105, which authorizes mining corporations organized under the laws of the state to purchase and hold stock in other mining companies, is within the power to amend the general incorporation law reserved by article 15, § 1, of the state Constitution, and does not so interfere with the contract between a stockholder and the corporation as to require the stockholder's acceptance of it as an amendment of the charter, and, if such acceptance were necessary, user of the power would be sufficient.<sup>b</sup>

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 105.]

**CORPORATIONS (§ 197)—PURCHASING STOCK IN OTHER CORPORATIONS—RIGHTS AS STOCKHOLDERS.**—A corporation having statutory power to purchase and hold stock of another corporation has the incidental power to vote the same.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 760; Dec. Dig. § 197.]

Acquisition by corporation of stock of other corporation, see note to Anglo-American Land, Mortgage & Agency Co. v. Lombard, 68 C. C. A. 120.]

**MONOPOLIES (§ 9)—COMBINATIONS IN RESTRAINT OF TRADE—FEDERAL STATUTE.**—The power of Congress to legislate on the subject of

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<sup>a</sup> For opinions of Circuit Court (155 Fed. Rep. 869; 167 Fed. Rep. 704) see *ante*, pp. 293, 593.

<sup>b</sup> Syllabus copyrighted, 1909, by West Publishing Company.

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contracts and combinations in restraint of trade is derived from its constitutional power to regulate interstate and foreign commerce, and the Sherman Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), is to be so construed, and applies only to contracts or combinations which directly, immediately, and necessarily affect commerce among the states or with foreign nations.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 9.]

**MONOPOLIES (§ 20)—COMBINATIONS IN RESTRAINT OF TRADE—COMBINATIONS BY MINING CORPORATIONS.**—That one Michigan mining corporation engaged in mining and refining copper wholly within that state, by purchases of stock and obtaining proxies from other stockholders, secured voting control of a majority of the stock of another similar corporation operating adjoining mines, and purposed to use such control to place in its directory a majority from its own board of officers, all of which it had the right to do under the laws of the state, did not directly or necessarily affect interstate or foreign commerce, and such control is not of itself illegal as a combination in restraint of such trade or commerce in violation of the Sherman Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), in the absence of evidence of an unlawful intent to so use it as to bring about the prohibited restraint or monopoly, and not in a lawful way in the interest of an economical management of both companies.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 20.]

**MONOPOLIES (§ 20)—COMBINATIONS IN RESTRAINT OF TRADE—COMBINATIONS BY MINING CORPORATIONS.**—Neither "Lake Copper" nor that part classed as Best Lake is so far a distinct commercial commodity as to justify the exclusion of Western or electrolytic copper as a factor in determining whether a combination of two corporations, together producing less than one-half of the Lake [722] copper and about one-ninth of the production of the United States, constitutes a monopoly.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 20.]

**MONOPOLIES (§ 20)—COMBINATIONS IN RESTRAINT OF TRADE—MICHIGAN STATUTES.**—The purchase by one Michigan mining corporation of the stock of another, expressly authorized by statute, and thereby and with the aid of proxies from other stockholders securing control of the latter, held, under the evidence, which showed that the two together produced only about one-ninth of the copper of the United States, not in violation of the Michigan statutes prohibiting monopolies and combinations in restraint of competition (Pub. Acts Mich. 1899, p. 409, No. 255, and Pub. Acts Mich. 1905, p. 507, No. 329), nor was the purchase by such corporation of additional lands excessive and unlawful under the laws of the state.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 20.]

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Appeals from the Circuit Court of the United States for the Western District of Michigan.

For opinion below, see 167 Fed. 704.

*H. E. Boynton* and *A. C. Denison*, for appellant.

*Otto Kirchner* and *A. F. Rees*, for appellees.

Before LURTON and SEVERENS, Circuit Judges, and COCHRAN, District Judge.

LURTON, Circuit Judge.

These cases have been heard together upon the same transcript. The solution of the questions presented by one will substantially determine the other. The first and principal bill is that of Albert S. Bigelow against the Calumet & Hecla Mining Company and the Osceola Consolidated Mining Company. The complainant, Bigelow, is a citizen of Boston, Mass. The defendants are copper mining companies created under the laws of the state of Michigan. The complainant is a large stockholder in and president of the Osceola Consolidated Mining Company. In his character as a stockholder of that company he has filed this bill to enjoin the Calumet & Hecla Company from voting shares of the capital stock of the Osceola Company owned by it, and also to enjoin it from voting certain proxies held in its interest, at the annual stockholders' meeting for the election of a board of directors which was about to occur when the bill was filed.

The bill in the second case was filed by Mr. Bigelow in his character as a small holder of shares of the capital stock of the Calumet & Hecla Company, acquired since the starting of the first suit, for the purpose of questioning the legality of the purchase by that company of some 50,000 acres of additional copper-producing lands in Michigan, and also for the purpose of questioning the power of that company under its charter, as well as under the federal and state legislation against monopolies and illegal restraints of trade and commerce, and to enjoin that corporation from acquiring other



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mining lands or shares of stock in other mining companies and from exercising the power of voting upon any such shares already acquired.

[723] An injunction pendente lite was granted under the first bill. The grounds for this action are found in an opinion by Judge Knappen. 155 Fed. 869. No injunction was applied for under the second bill. Upon a final hearing the bills in both cases were dismissed. Pending this appeal the injunction, which operated to preserve the status quo by preventing the election of directors pending this suit, was continued.

The essential facts are these: Both companies are Michigan corporations engaged in mining and refining copper. The properties of the two companies are contiguous and situated in the copper district of the northern peninsula of Michigan. The Calumet & Hecla Company has bought outright 22,671 shares of the capital stock of the Oceola Company, and has obtained proxies, which are held in its interest, in part with options of purchase, in an amount sufficient with its holdings to make a majority of the 100,000 shares which constitute the total capital stock of the Oceola Company. There is no doubt but that the purpose of the acquisition was to enable the Calumet Company to elect a majority of the directors of the Oceola Company from the board of the Calumet Company. This was avowed in circular letters soliciting proxies from the shareholders of the former company. That such company was to continue its operations as an independent company is equally clear. No other course was possible, though one should eliminate the other so far as active competition might result from the control of a majority of the shares and the exercise of the power of selecting directors incident to such stock control.

We need not consider the power at common law of such corporations to own and vote shares in similar corporations, for the reason that in Michigan the Legislature has not deemed such restrictions wise or desirable, for there have been a series of enactments relaxing the common-law rule. Comp. St. Mich. § 7012, Pub. Acts Mich. 1903, pp. 382, 383, No. 233, culminating in the act of 1905, No. 105, Pub. Acts

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Mich. 1905, pp. 153, 154, which provides that corporations organized under the Michigan mining law or under any other laws for refining, smelting, or manufacturing ores, metals, or minerals may "subscribe for, purchase, own or dispose of stock in any company organized under this act, or under any other laws, foreign or domestic, for the purpose of mining, refining, smelting or manufacturing any or all kinds of ores or minerals." That the latter act does not so seriously interfere with the contract between the company and its shareholders as to require the shareholders' acceptance as an amendment of the charter powers, we think clear. The amendment, while allowing a wide expansion of the business operations of such companies, is not so fundamental as to be beyond the power of the Legislature under the constitutional reservation of the power to alter or amend the general constating act under which corporations may be organized in Michigan. *Attorney General v. Looker*, 111 Mich. 498, 69 N. W. 929; *Looker v. Maynard*, 179 U. S. 46, 21 Sup. Ct. 21, 45 L. Ed. 79; *Louisville Trust Company v. Railroad Co.*, 75 Fed. 445, 448, 22 C. C. A. 378. User of the [724] power conferred by the amendment is evidence of acceptance, if acceptance be necessary. *Miller v. Insurance Co.*, 92 Tenn. 167, 21 S. W. 39, 20 L. R. A. 765; *Cahill v. Kalamazoo Mutual Ins. Co.*, 2 Doug. (Mich.) 124, 43 Am. Dec. 457. The right to vote stock so lawfully acquired is, of course, an incident to ownership. Comp. Laws Mich. § 7002. *Rogers v. Railroad Co.*, 91 Fed. 299, 312, 33 C. C. A. 517; *Taylor v. Southern Pacific R. R. Co.* (C. C.) 122 Fed. 147, 151. There is nothing, therefore, in the laws of Michigan which forbids the holding or voting of these shares owned, or those for which proxies are held in the interest of the Calumet Company, unless such ownership or voting shall result in an illegal monopoly or combination in restraint of trade, either under the Federal Anti-Trust Act or the Michigan anti-monopoly act of 1899, p. 409, No. 255, and the Public Acts of Michigan of 1905, p. 507, No. 329. In view of the very broad powers expressly conferred by the state of Michigan to such corporations to buy and hold shares in similar companies, it is very clear that, if the incidental voting powers and the ownership of the shares in question is not an illegal

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monopoly in restraint of trade, the question of the effect upon interstate commerce aside, it was not forbidden by the laws of Michigan. We shall therefore deal with the case in its aspect under the federal act forbidding restraints and monopolies.

Laying on one side, therefore, many interesting questions which have been discussed by counsel as going to the possibility of relief under these bills, we come to the application of the act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200). The relevant sections are the first and second. They are as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

We shall assume at the outset that the authoritative decisions of the Supreme Court have so construed this Anti-Trust Act as to give it a broader application than the prohibition of contracts and agreements in restraint of trade at the common law. It is not essential that the restraint shall be unreasonable within the well-understood definition of an unlawful restraint before the statute. Under this act the validity of an alleged combination or contract in restraint of trade, interstate or foreign, is to be determined by the terms of the statute which forbids any such contract or combination without respect to its nature or beneficial results. We need only cite the latest utterance of that court upon the subject. *Loewe v. Law*[725]lor, 208 U. S. 274, 297, 28 Sup. Ct. 201, 52 L. Ed. 488; *Northern Securities Co. v. United States*, 193 U. S. 197, 331, 24 Sup. Ct. 436, 48 L. Ed. 679. But the

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power of Congress to legislate upon the subject, aside from the territories and the District of Columbia, is derived from its power to regulate commerce among the states and with foreign nations. It is therefore well settled that it does not apply to restraints or monopolies as such, but only to those which directly and immediately, or those which necessarily, affect commerce among the states or with foreign nations. If the law were held applicable to contracts or combinations indirectly or remotely affecting such commerce, it would substantially obliterate the distinction between interstate and intrastate commerce, the latter being as exclusively within the regulating power of the state as is the former within the power of Congress. In *Hopkins v. United States*, 171 U. S. 578, 594, 600, 19 Sup. Ct. 40, 45, 46, 48 L. Ed. 200, Mr. Justice Peckham emphasizes this obvious limitation when, speaking for the court, he said:

"There must be some direct and immediate effect upon interstate commerce in order to come within the act."

The same discriminating justice then adds:

"An agreement may in a variety of ways affect interstate commerce, just as state legislation may, and yet, like it, be entirely valid, because the interference produced by the agreement or by the legislation would not be direct. \* \* \* The act must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly restrain it."

This limitation of the act to those contracts and combinations which directly and immediately or necessarily affect commerce among the states is recognized in a long series of opinions. Among them are: *United States v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; *Addyston Pipe Co. v. United States*, 175 U. S. 211, 242, 20 Sup. Ct. 96, 44 L. Ed. 136; *Montague & Co. v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608; *Northern Securities Co. v. United States*, 193 U. S. 197, 331, 24 Sup. Ct. 436, 48 L. Ed. 679; *Loewe v. Lawlor*, 208 U. S. 274, 297, 28 Sup. Ct. 301, 52 L. Ed. 488. The *Knight* case, in its last analysis, is but a striking illustration of the rule that the monopoly or agreement to come within the act must directly and imme-

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diately affect interstate commerce. Confining the case to its facts, it establishes the proposition that a mere combination between manufacturers only, by which a monopoly of a product results, is not, without other special circumstances, sufficient to justify an active intervention under the act to undo a contract by which such monopoly has been brought about. That the product thus monopolized by such combination of mere manufacturers may ultimately find itself into the stream of interstate commerce is there held not to be such a special circumstance as to constitute the direct and immediate effect upon commerce among the states as to bring the agreement within the act. Subsequent cases have been distinguished from it, but it has never [726] been overruled. In *Addyston Pipe Co. v. United States*, 175 U. S. 211, 240, 20 Sup. Ct. 96, 107, 44 L. Ed. 136, it was said:

"The direct purpose of the combination in the *Knight case* was the control of the manufacture of sugar. There was no combination or agreement, in terms, regarding the future disposition of the manufactured article; nothing looking to a transaction in the nature of interstate commerce. The probable intention on the part of the manufacturer of the sugar to thereafter dispose of it by sending it to some market in another state was held to be immaterial and not to alter the character of the combination. The various cases which have been decided in this court relating to the subject of interstate commerce, and to the difference between that and the manufacture of commodities, and also the police power of the states as affected by the commerce clause of the Constitution, were adverted to, and the case was decided upon the principle that a combination simply to control manufacture was not a violation of the act of Congress, because such a contract or combination did not directly control or affect interstate commerce, but that contracts for the sale and transportations to other states of specific articles were proper subjects for regulation because they did form part of such commerce."

Referring to the facts in the *Addyston* case as taking it out of the *Knight case*, the court said:

"We think the case now before us involves contracts of the nature last above mentioned, not incidentally or collaterally, but as a direct and immediate result of the combination engaged in by the defendants.

"While no particular contract regarding the furnishing of pipe and the price for which it should be furnished was in the contemplation of the parties to the combination at the time of its formation, yet it was their intention, as it was the purpose of the combination, to directly

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and by means of such combination increase the price for which all contracts for the delivery of pipe within the territory above described should be made, and the latter result was to be achieved by abolishing all competition between the parties to the combination. The direct and immediate result of the combination was therefore necessarily a restraint upon interstate commerce in respect of articles manufactured by any of the parties to it to be transported beyond the state in which they were made. The defendants, by reason of this combination and agreement, could only send their goods out of the state in which they were manufactured, for sale and delivery in another state, upon the terms and pursuant to the provisions of such combination. As pertinently asked by the court below, was not this a direct restraint upon interstate commerce in those goods?"

In *Loewe v. Lawlor*, 208 U. S. 297, 28 Sup. Ct. 305, 52 L. Ed. 488, it was said of the combination involved in the *Knight* case that "the purpose of the agreement was not to obstruct or restrain commerce. The object and intention determined its legality." *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, was a case of a combination between fresh meat dealers, dominating a large proportion of the trade in the United States, for the purpose of regulating prices, shipments, and freight rates to the exclusion of competition. The combination was, of course, invalid within the law. The court, in its opinion by Justice Holmes, in dealing with the effect of the combination as a restraint upon commerce among the states, said that restraint of that commerce was—

"a direct object; it is that for which the said several specific acts and courses of conduct are done and adopted. Therefore the case is not like *United States v. Knight Co.*, where the subject-matter of the combination was manufactories within a state. However likely monopoly of commerce among the states in the article manufactured was to follow from the agreement, it was not a [727] necessary consequence nor a primary end. Here the subject-matter is sales, and the very point of the combination is to restrain and monopolize commerce among the states in respect to such sales."

The specific thing complained of in the case for decision is that one Michigan mining corporation has obtained by purchase or proxy a majority of the capital shares of another Michigan mining corporation, and purposes to exercise its voting power to place in the directory of the latter a majority of its own selection from its own board of officers. The specific relief sought is an injunction against the exercise of the

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voting power, and a decree compelling a disposition of the shares so held under purchase or proxy. What has the Calumet & Hecla Mining Company done or what does it threaten to do which is a violation of the Anti-Trust Act of Congress? It has the legal right to purchase and vote shares of stock in the Oceola Company under the laws of Michigan. This we have already considered. Of course, if such stock ownership and such stock control is enough to constitute a direct and immediate or necessary restraint upon trade and commerce between the states, the sanction of the state act goes for nothing. This much is settled by the *Northern Securities case*, for a state can not give to a corporation the lawful right to do anything which is a direct restraint of commerce between the states. How, then, does the exercise of the power of stock control by one mining or manufacturing corporation over another in the same state directly and immediately or necessarily operate as a restraint of commerce among the states? Confessedly the products of these two companies are in competition in the markets, and confessedly the greater part of the product of each will, sooner or later, enter into the stream of interstate commerce, for the chief demand for the product is outside the state of production. But that is not enough. There was all this and more in the *Knight case*. If, indeed, such stock control results in a monopoly, it is only a monopoly in manufacture in the same state, and we have again the conceded situation in the *Knight case*. Unless that monopoly of manufacture in a single state of a product which goes into interstate commerce directly and immediately or necessarily interferes with or restrains that commerce, the monopoly does not come under the act of Congress. But we are unable to conclude upon this record that mere stock control of such a company by another in the same state either directly or necessarily destroys competition there, or, if it did, that it results in any such monopoly as to directly or necessarily and immediately affect commerce among the states.

The Calumet & Hecla Mining Company does not own a majority, nor anything like a majority, of the stock of the Oceola Consolidated Mining Company. If it has the power

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to cast a majority of votes at a stockholders' meeting, it is because there are enough of the stockholders of the latter company willing to cooperate with it in the selection of a board. But it does not follow, if we assume for the purposes of this case that the evil is the same whether its power of election is due to a combination of shares owned with proxies or by the ownership of a majority of all the stock, that the ownership constitutes a legal control, or that competition is thereby ended. A board elected by the owner of such a majority would not in any legal sense be the control of such majority owner, nor from such ownership could the legal inference be drawn that the Calumet & Hecla Company dominated the management of the Oceola Company. The two companies would still remain separate corporations, each managed presumably in its own interest. *Pullman Co. v. Missouri Pacific Co.*, 115 U. S. 587, 596, 6 Sup. Ct. 194, 29 L. Ed. 499; *Porter v. Pittsburg Bessemer Steel Co.*, 120 U. S. 649, 670, 7 Sup. Ct. 1206, 30 L. Ed. 830; *Richmond Construction Co. v. Richmond*, 68 Fed. 105, 15 C. C. A. 289, 34 L. Ed. 625. But if the presumption be, in respect to a question of restraint or monopoly under the act of Congress, that the power to determine the management of a competing corporation through ownership of a majority of shares constitutes a suppression of competition, we come to the inquiry as to whether such presumption is one of fact or law. If one of fact, as it evidently is, it is rebuttable. We quite agree that purpose or motive is of no moment, provided the contract or agreement directly provided for the suppression of competition, or when such a result, as a matter of law, must necessarily occur. *United States v. Freight Ass'n*, 166 U. S. 291, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Chesapeake & Ohio Fuel Co. v. United States*, 115 Fed. 610, 623, 53 C. C. 256. But when the agreement or combination in question does not in its terms provide for the suppression of competition or the creation of a monopoly, nor bring about such a result as a necessary legal consequence, but requires further acts or conduct to bring about such an unlawful result, some evidence of an unlawful intent becomes essential, that the court may see that, if not stopped, a prohibited restraint is likely to



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be created. In *Swift Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, it was said by Mr. Justice Holmes that:

"The statute gives this proceeding against combinations in restraint of commerce among the states, and against attempts to monopolize the same. Intent is almost essential to such a combination, and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth v. Peaslee*, 177 Mass. 287, 272, 59 N. E. 55. But when the intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against the dangerous probability as well as against the complete result."

The power of stock control which the Calumet Company has acquired may be exercised only in a legitimate and lawful way in the interest of an economical management of both companies. In that case, it has done nothing directly affecting commerce among the states.

On the other hand, that power may be a mere preparation for the doing of acts which will directly and necessarily interfere with the [729] freedom of that kind of commerce which it is the purpose of Congress to protect. When this unlawful use of the power shall result in an unlawful restraint, or further steps shall point to results directly affecting such commerce, there may be interference by the courts.

The Calumet & Hecla Mining Company vigorously deny any purpose to either bring about a monopoly, restrain competition, or diminish production, and assert that their only object was to extend their industrial life by the acquirement of an interest in the ore-producing lands of the Oceola Company and the more economical management of their own property by a friendly and mutually advantageous use of the facilities of the two companies. The two properties are in large part contiguous. In a very convincing opinion, the judge who heard the case below states the leading facts which made it desirable and economical that there should be, to a certain extent, a cooperation in future mining operations by

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the two companies, in order that certain poorer lodes underlying the conglomerate lode of the Calumet Company, which has been worked to a point where exhaustion is in sight, may be worked to the best advantage of both companies. We shall not go into the details. We refer and adopt the conclusion stated by Judge Knappen, who thus sums up the evidence relating to the motive or purpose actuating the Calumet & Hecla Mining Company:

"I am convinced, from a careful consideration of the testimony, that the controlling motive and purpose of the Calumet & Hecla Company in acquiring its interest in the mining properties mentioned was to extend its industrial life, and keep up and increase, if possible, its production and net earnings, and that the evidence fairly negatives a design thereby to reduce the output of any of the companies or artificially to increase or maintain the price of the product, or to stifle competition between the related companies, or to prejudice other stockholders generally of either company associated, or to interfere with the integrity of either company, a common management with separate detailed organization being contemplated. The evidence does not indicate that any use of the facilities of the associated companies is contemplated, except upon terms and in manner mutually advantageous."

But it is said that the stock control of the Oceola Company will result in a monopoly. If this be so, and it be only a monopoly in mining and refining copper brought about by the combination of two companies of the same state conducting their operations side by side, it is not enough, under the *Knight case*, to bring the agreement within the act, even though the fact be that the product will in large part pass ultimately into interstate commerce. In the *Knight case* the American Sugar Refining Company, if permitted to combine with the four independent refining companies at Philadelphia, would control 98 per cent of all the sugar refining in the United States. Such a combination undoubtedly brought about a monopoly under the common law. But as it was only a monopoly in manufacture, it was held not to be a restraint of trade among the states, although the great bulk of the product was ultimately destined for commerce among the states, the effect upon such commerce being indirect. There is, in fact, no parallel between the facts of that case and this in respect to the probable results of the two com-

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binations. In this case it is shown that the world's production of copper in [730] 1896 was approximately 1,600,000,000 pounds, of which amount about 900,000,000 pounds was produced in the United States. The production of the copper called "Lake Copper"—that is, copper produced in the Lake Superior region—was about 224,000,000 pounds, or one-fourth of the entire product of the United States and one-eighth of the world's product. The Calumet & Hecla Company produced, of this amount, about 95,000,000 pounds, and the Oceola Company about 18,500,000 pounds. So far from the "control" of the smaller company by the larger resulting in a monopoly, it is evident that the combined output would be less than one-half of the product of the Lake copper alone, or about one-ninth of the product of the United States and about one-fifteenth of the product of the world.

But the complainant has very seriously insisted that, in the determination of the question as to whether the stock control of the Oceola Company will result in a monopoly and an unlawful suppression of competition, every class or grade of copper should be eliminated except that particular class or grade made by the Calumet & Hecla Company and the Oceola Company and a few smaller producers, upon the contention that the product of these companies is a distinct commercial commodity, known in the market as "Best" or "Prime Lake Copper," as distinguished from Western or electrolytic copper. The great bulk of the copper of the world is treated electrically. The purpose is to free it from impurities, for the purer it is the greater its conductivity. Arsenic is an ordinary impurity, and the presence of this in small quantities adds, or is supposed to add, to the tensile strength of the copper, for which reason copper having this slight admixture of arsenic is preferred by some makers of copper wire. Hence some manufacturers of wire specify in their purchases of copper "Best" or "Prime Lake Copper," meaning copper not so electrically treated as to entirely eliminate this arsenical impurity. But it is demonstrated that electrolytic copper is capable of being used for every purpose for which "Best Lake Copper" can be used, and that they actively compete with each other in the markets of the

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world, though, as a rule, the quotations for "Best Lake" are slightly higher than Western or electrolytic copper. There is no material intrinsic difference between the two kinds. The court below, upon a full review of the evidence, expert and non-expert, reached the conclusion that neither "Lake Copper" nor "Best Lake Copper" is so far a distinct commodity as to justify an elimination of the electrolytic copper as a factor in a case like this. In this we entirely concur.

When all is said which the facts justify, the acquisition of the voting power of a majority of the capital shares of the Ocala Consolidated Mining Company and its proposed exercise by the selection of a board, a majority of which to be composed of the members of the board of the Calumet & Hecla Company, is the main fact upon which the complainant must invoke the prohibition of the act of Congress. That fact is not enough. That the two companies are in a sense competitors, and that the product of their mines will ultimately go into interstate commerce, is far from making out a [731] case of direct or necessary and immediate interference with that kind of commerce. They do not show that even a monopoly of the product will ever probably ensue, to say nothing of the utter absence of any material evidence indicating that such a monopoly in the product of two contiguous mining companies would directly or necessarily affect commerce among the states. No express agreement is shown by which anything is to be done or left undone from which an unlawful restraint must, or will, probably happen. The case differs from all of the cases appealed to by the learned counsel for appellants in this important particular. In the *Addyston Pipe case*, the agreement specifically provided a scheme for the suppression of competition between the parties in the matter of sales of iron pipe in a large number of states through a division of territory and sham bids, the parties agreeing to divide among each other a share in the profits made by the mill to which, by their concerted effort, the particular sale was directed. In *Montague v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608, was involved an express agreement between man-

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ufacturers of tiles and dealers within a given territory by which the plaintiffs were unable, not being members of the combination, to procure tiles without paying a great advance over those who were members of the combination. In the case of *Swift & Company v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, the agreement involved a combination between packers and dealers in fresh meat throughout the United States for the express purpose of regulating prices, freights, and shipments and sales of live stock. *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, involved a widespread combination among the union labor organizations to prevent the sale of hats anywhere within the United States made by a hat maker at Derby, Conn., until he should unionize his shops. In *Chesapeake & Ohio Fuel Co. v. United States*, 115 Fed. 610, 53 C. C. A. 256, there was an express agreement among 14 coal-mining companies engaged in interstate commerce for the purpose of fixing prices and regulating production and shipments. The cases of *Continental Wall Paper Co. v. Voight*, 148 Fed. 939, 78 C. C. A. 567, and *John D. Park & Sons Co. v. Hartman*, 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135, both being decided by this court, were cases which involved systems of contract between producers, wholesale and retail, carrying on business in every state of the Union, for the express purpose of maintaining prices and stifling competition, and were obviously cases which directly affected freedom of commerce among the states.

In the absence of any such express terms of the agreement providing for acts directly affecting interstate commerce, complainants must by facts and circumstances show that the direct and necessary result of what has been done and threatened is to restrain interstate commerce. The burden of showing acts and circumstances which establish the fact that an unlawful result is contemplated and will ensue, unless checked, is upon those asserting the illegality of the contract assailed.

[732] In *Cincinnati, P. B. S. & P. Packet Co. v. Bay*, 200 U. S. 179, 184, 26 Sup. Ct. 208, 209, 50 L. Ed. 428, it is cogently said, in respect to the question as to whether a par-

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ticular combination or agreement will operate to produce an unlawful result under the anti-trust law, that "a contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts."

No unlawful object has been shown, and no such facts established, as to convince us that the necessary consequence of the combination complained of will result in any direct, immediate, or necessary restraint of interstate commerce.

Finally, the facts of the case do not bring the conduct of the Calumet & Hecla Mining Company under the condemnation of the Michigan statute against monopolies. The purchase of shares and the acquirement of the additional 50,000 acres of copper-producing lands has the sanction of the express law of Michigan, and, while the power to acquire shares or additional lands may be subject to the condition that such acquisition shall not result in monopoly or the unlawful suppression of competition, there are no such results to be feared from the acts and conduct attributable to the Calumet & Hecla Mining Company as to bring it within the Michigan act.

The decree dismissing the bill and discharging the injunction must be affirmed.

COCHRAN, District Judge.

I concur with Judge Lurton's statement of fact and in the conclusion he has reached, but think best to state the particular ground upon which I have come to that conclusion. The principal ground upon which it is claimed that the decrees of the lower court should be reversed is that the transaction complained of was in violation of the national anti-trust act. It is urged also that it is in violation of the Michigan anti-trust act. The stress of the argument is upon the application of the national act, and I will proceed at once to address myself to the question as to whether it affects the legality of the transaction complained of.

Here, we must first inquire whether this question is an open one. Is or not a consideration thereof foreclosed by any decision of the Supreme Court? I think that it is, and

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that by the first decision made by that court under that act. I refer to the case of *United States v. E. C. Knight Company*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325. It is practically conceded that this is so, if the authority of that case has not been overthrown or weakened by subsequent decisions. It is earnestly contended that it has been substantially overruled by later decisions of the Supreme Court. The decisions relied on are those in the cases of *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; *Northern Securities Company v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679; *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518; *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488. It is claimed that the decision in the *Addyston Pipe & Steel Company* case left not much, if any, force in it, and that in the *Swift* case left nothing of it. But the deci[733]sion in the *Northern Securities Company* case is claimed to be more in point than either of the others, as its facts fit more closely the facts of the *Knight* case, and it is said that these suits were brought on the basis of the decision in that case. It is further claimed that the majority of the court in the case of *United States v. American Tobacco Company* (C. C.) 164 Fed. 700, took the position that the *Knight* case is no longer any proper foundation for the point decided in it. In answer to the possible suggestion that in no subsequent case has the Supreme Court expressed any doubt as to the correctness of the decision in that case, and that whenever it has referred thereto it has done so with seeming approval, it is said that the Supreme Court had in mind that the facts of the case were different from what they really were, and that what it so approved was this supposititious case and not the real case. This is shown, it is claimed, by the consideration that the points actually decided in these later cases are in direct conflict with that really decided in the *Knight* case.

I think that the majority of the court in the *American Tobacco Company* case hardly went as far as claimed, but at least two of the three judges constituting that majority did question the correctness of the decision in that case, and

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did intimate that it was overthrown by the later decisions. Judge Lacombe said that it seemed to him that subsequent decisions of the Supreme Court had modified the opinion in that case, and Judge Coxe that it was interesting to note that the Chief Justice, who wrote the opinion of the court therein, also wrote the unanimous opinion in *Loewe v. Lawlor*, that an examination of numerous decisions since that case leads to the conclusion that there had been constantly a tendency toward a broader and more liberal construction of the statute or wider scope therefor, and that the only distinction between that case and the *Loewe-Lawlor* case is that in one the acts complained of related to the manufacture and sale of sugar and in the other to the manufacture and sale of hats. Both these judges seem to indicate a preference for the view taken by Justice Harlan in his dissenting opinion. I do not find that Judge Noyes, the other judge of the majority, questioned the authority of that decision to any extent. Judge Ward, who dissented, took the position that that decision had not been affected by any subsequent one and is still in full force. Counsel for appellant attacked that case in the lower court, the same as here, and possibly with some measure of success, as it seems to have been somewhat shy of basing the conclusion reached on the authority thereof.

The vital relation of the *Knight* case to this case, and the attack made upon it in the *American Tobacco Company* case and here, calls for a somewhat extended consideration thereof. The propriety of so doing is helped out by the fact that this seems to be the first case that has arisen since then involving the exact question involved therein. I do not understand that the *American Tobacco Company* case hinges upon that case, as this one does. Besides, a true conception of what was decided therein and the reasoning upon which it was based is essential to a correct determination of the effect thereon of the later cases which are claimed to have overthrown it.

[734] I may say at the outset that I think that that case not only fits this case, and has not been affected by the decision in any subsequent case, but that it was correctly decided; and, further, that it is not likely that it was incor-



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rectly decided. The conclusion there reached represented not only the views of all the members of the Supreme Court except Justice Harlan, who dissented, and Justice Jackson, who did not sit therein because of illness, but of the Circuit Court of the Eastern District of Pennsylvania, where the case originated, and of the Circuit Court of Appeals for the Third Circuit, where it was first carried on appeal. And though Mr. Justice Jackson did not sit in the case, the conclusion reached accorded with his views as expressed in the case of *In re Greene* (C. C.) 52 Fed. 104, a case of like character, and those courts, in deciding as they did, simply followed in the path which he had theretofore clearly marked out.

In considering this case, I would direct the attention singly to three separate and distinct matters. They are, first, the condition of things before the doing of the thing complained of therein; second, the thing done that was complained of; and, third, the thing sought to have done. The condition of things referred to was this: The American Sugar Refining Company, a New Jersey corporation, in New York, New Jersey, and several other places, was engaged in the business of refining sugar thereat and selling the sugar so refined. The business which it so did was 65 per cent of the business of that kind done in the United States. The E. C. Knight Company, the Franklin Sugar Company, the Spreckels Sugar Refining Company, and the Delaware Sugar House, each of which was a Pennsylvania corporation and had no connection with the others, owned like plants located at Philadelphia, and were engaged in the business of refining sugar at their respective refineries and selling the sugar so refined. The business done by all four was 33 per cent of the whole. The business done by the five, therefore, constituted 98 per cent thereof. The other 2 per cent was done by a Massachusetts corporation, the Revere, whose plant was located at Boston. Each one of the five corporations was engaged in external commerce. They sold sugar for delivery in other states than where made and sold, and no doubt a great, if not the principal, part of the business done by them was so sold. The facts of the case will not allow this fea-

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ture thereof to be minimized; and, as I view it, there is no occasion to minimize it.

Then, what was the thing done that was complained off? The American Company purchased the entire capital stock of the other four companies, and gave in exchange therefor shares of its own stock. It thus acquired control of 98 per cent of the business of making and selling refined sugar in the United States. This control as to 65 per cent was by virtue of its ownership of its own plant, and as to 33 per cent by virtue of its ownership of the entire capital stock of the other four companies, enabling it to choose the boards of directors thereof, who would have control of the operation of their plants respectively. And the acquisition of such stock was for the purpose of obtaining such control. This feature of the case, also, is not to be blinked.

[785] And finally, as to the thing sought to have done. It was simply an undoing of what had been done, and an injunction against attempting to do it again. It was held that the nation was not entitled to have this thing done. We are thus brought face to face with the reasoning upon which this conclusion was based. It was not that what had been done was not within the national act. The court went deeper than this. It was that the nation, through Congress, by the national act, had no right to attempt to prevent what had been done from being done, and hence had no right to complain of its being done. Of course, this being so, the presumption was that the nation, through Congress, had not by the national act attempted to prevent what had been done from being done, and hence that it was not within the act. But the court concerned itself with the deeper question—with what was fundamental, and not with what was accidental. And, if I may be permitted to suggest it, I think that the confusion that has arisen as to the correctness and effect of the decision in the *Knight case* and the effect thereon of the later decisions is due to the fact that it has been overlooked that concern was there had, not with what the act meant, but with what the nation, through Congress, had power to enact.

How, then, was it made out that the nation had no right, through Congress, by that act, to prevent what had been

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done from being done, and hence had no right to complain of its being done. It was in this way. What had been done was not external commerce, nor did it relate to or affect directly such commerce, and hence did not come within the commercial provision of the national Constitution, which was the only provision thereof that could be claimed to authorize the nation, through Congress, to prevent what had been done from being done. So far as it was commerce at all or was related to or directly affected commerce, it was internal commerce, and the doing of it was solely within the state's jurisdiction. Mr. Chief Justice Fuller emphasized the importance of respecting the boundary of each government's jurisdiction. It was "vital," he said, that "the delimitation between the two, however sometimes perplexing, should always be recognized and observed." And, further, he said that "acknowledged evils, however grave and urgent they may appear to be, had better be borne than the risk be run in the effort to suppress them of more serious consequences by resort to expedients of even doubtful constitutionality."

To complete the line of reasoning upon which the conclusion reached is based, it remains to indicate wherein what had been done was held not to be external commerce and not to relate thereto or affect it directly. It was essential both that it was not such commerce, and that it did not relate thereto or so affect it, in order that what had been done should have been beyond the national jurisdiction. The nation has jurisdiction of what relates to or affects directly external commerce as well as external commerce itself under the commercial provision. It is necessary to complete jurisdiction of such commerce. Jurisdiction of the thing itself would be of but little consequence if jurisdiction did not also cover that which related thereto or affected [736] it directly. It is only of what is not external commerce and affects it only indirectly that it does not have jurisdiction. There was no room to claim that what had been done was itself external commerce. What had been done was simply the purchase by the one company of the entire capital stock of the other four, and the giving in exchange therefor shares of its own capital stock. If it be a fact that a sale of such

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stock for delivery in another state than that where the sale was made would have been external commerce, there was no such sale made. The most that can be claimed is that what had been done related to or affected directly such commerce. Did it do so?

Each corporation was a Pennsylvania corporation. The refineries and other property owned by each was internal. The operation of the refineries and manufacture of refined sugar thereat was internal. It was only when the corporations were engaged in selling the sugar so made that things took on an external hue, and then only in case sales for delivery outside of the state were made. Commerce has been likened to a stream, and sugar produced at those refineries did not become a part of external commerce until placed in the stream of external commerce, which would be when sold for delivery on the outside. Sales for delivery within the state were purely internal. Now, the purchase of the stock had no relation to and did not affect in any way the sugar that had been put into the stream of external commerce prior thereto. That was a matter of the past. Nor did it relate to or affect directly the sugar that might be placed therein thereafter. It depended entirely on whether thereafter the refineries were operated, and, if operated, on whether, if any of the sugar thereafter refined thereat were placed in said stream, such purchase would affect it at all. The mere fact that the intent and purpose was to place such sugar therein could not make such purchase relate to or affect directly external commerce. It may be said that it affected it, but only indirectly so. If it can be said that it affected it directly, then, whenever one, under any circumstances, intends and purposes to place property owned by him in the stream of external commerce, such commerce is affected directly, and he and that property pass within the national jurisdiction. But this cannot be. As well said by Mr. Justice Lamar in the case of *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346:

"If it be held that the term (commerce) includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include the productive industries that contemplate the same thing.

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The result would be that Congress would be invested to the exclusion of the states with the power to regulate not only manufacturers, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry."

In the *Knight case* Mr. Chief Justice Fuller said:

"Slight reflection will show that if the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control."

The purchase of those stocks no more related to or affected directly external commerce than if the American Company, instead of pur[737]chasing them, had purchased from those corporations themselves their refineries and other property. Purchase of the capital stock was but an indirect way of acquiring the properties themselves. By the purchase, instead of acquiring the properties of the corporations, they acquired an interest in the corporations that owned them. If the properties of the corporations had been owned and operated, not by the corporations, but by trustees for the benefit of the stockholders, a purchase from the cestuis que trustent of their beneficial interests would have had no more relation to or affected no differently external commerce than a purchase from the trustees.

Such, then, is the line of reasoning by which the Supreme Court reached its conclusion in the *Knight case*. I have put it in a different and somewhat amplified form in an effort to make it plain, but a reading of Mr. Chief Justice Fuller's opinion will show that I am justified in claiming that such is the reasoning on which that conclusion is based.

Before passing from the consideration of this case, it is to be noted that it was not involved therein whether if, after the purchase, those corporations had entered into an agreement amongst themselves concerning the external commerce to be done by them, such an agreement would have related to and affected directly such commerce and been within the national jurisdiction. What was sought to have done was not the undoing of any such agreement, but the undoing of the purchase of the stock. Nor was it involved therein whether

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the nation, through its jurisdiction over commerce among the states and with foreign nations, could by appropriate legislation have excluded from such commercial stream any of the sugar that had been manufactured at the refineries of any of the five corporations. These two questions are entirely distinct from that which arose and was decided in that case. That question was whether the one corporation had the right, so far as the national act was concerned, to purchase the capital stock of the other four. It was held that it did, and it seems to me that there is no escape from that conclusion and the reasoning on which it is based.

We come, then, to the question whether this decision has been affected to any extent by the subsequent decisions of the Supreme Court. As heretofore stated, I do not think that it has; and I will now attempt to make this position good. The extended consideration of the *Knight case* renders unnecessary any like consideration of the cases, the decisions in which are claimed to have affected that in that case. A very general reference thereto will be sufficient to show that they have in no wise affected it. Take, for instance, the *Addyston Pipe & Steel Company* and *Swift cases*, which are somewhat alike in their essential characteristics. Each of these cases involved an agreement between several independent manufacturers or producers, the one of iron pipe and the other of meat, each of whom was engaged in interstate commerce, which agreement related to and directly affected that commerce so far as they were engaged in it in the way of restraining it, their independency being preserved except so far as affected by that agreement. It was held that the agree[738]ment in each case was a combination within the national act, and its further execution was enjoined. In the *Swift case* the agreement related to and affected some matters that may be said to have been purely internal as well as to the external commerce of the parties thereto, and the execution of the agreement in those particulars was enjoined as well as in so far as it affected such commerce. The necessities of this case do not require a presentation of the line of reasoning by which Mr. Justice Holmes justifies this part of the decision. That portion thereof in no way concerns the *Knight case*.

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Then as to the case of *Loewe v. Lawlor*, sometimes referred to as the "*Danbury Hat case*." That case involved the question whether a boycott on the part of the United Hatters and affiliated organizations of laborers against the external commerce of the manufacturers of those hats was a combination within the national act. It was held that it was and its continuation was enjoined.

Now, I fail to see how these three cases have any bearing whatever on the *Knight case*. A decision that a combination that relates to and affects directly external commerce within the national act is certainly not antagonistic to one that decides that a transaction which does not relate thereto and affects it indirectly only is not within that act. Nor is a decision that an agreement between two or more corporations with reference to the external commerce done by them relates thereto and affects it directly antagonistic to one that decides that a purchase by one competitor of the property by which he carries on such business does not relate to external commerce and affects it indirectly only. Of similar character to these three cases is that of *Montague v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608.

Finally, how is it as to the *Northern Securities Company case*? It must be conceded that this case is more like the *Knight case* than either of the others. The minority judges in that case, as represented by the dissenting opinion of Mr. Justice White, regarded that the *Knight case* required a decision that the transaction there involved was not within the national act. Of course, if this position was correct, then the decision in that case does conflict with that in the *Knight case*, and the latter case must be considered to have been overthrown by the former. The likeness between the two cases consists in the fact that in the later case, as in the earlier one, the validity of the purchase of the stock in a corporation was involved. But even here there was a difference. In the earlier case the purchasing corporation was engaged in the same business as that of the corporations whose stock it purchased, and those corporations were competitors of it, whereas in the later case the purchasing corporation was not engaged in the same business as that of the competing corporations whose stock it purchased. It was engaged in

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no business except that of purchasing and holding that stock. But in this case, as in that, the effect of the purchase was to put the control of the competing corporations in one and the same hand. There was, therefore, nothing in this difference to cause a difference of decision. If one of the competing corporations in the *Northern Securities Company case* had purchased the capital stock of the other, we would have thus far [739] exactly the same case as the *Knight case*. And the purchase by the outside corporation of the capital stock of the two competing corporations was, in its legal significance, nowise different from a purchase by one of the two of the capital stock of the other.

But here the likeness between the two cases stops. In a striking particular they are different—so different in this particular as to necessitate, in my judgment, a difference of decision. That particular was this: The property of each of the two competing corporations, to wit, the Great Northern Railway Company and the Northern Pacific Railway Company, was interstate in its character, and the operation thereof was interstate. It follows that the purchase of the stock of the two corporations and combining them in one corporation was an interstate transaction. That transaction related to and affected directly interstate commerce. It did so as much as if the one corporation had purchased the property of the other. If that had been the nature of the transaction, it could not have been contended that it was not interstate in its character. How different this from what we have found to have been the case in the *Knight case*. The properties of the four Pennsylvania corporations and their operation were not interstate in their character. They were purely internal to the state of Pennsylvania, and likewise would have been their purchase by the New Jersey corporation. Nowise different was the purchase by it of the capital stock of these corporations. It follows that there was no room to claim in the *Northern Securities Company case* that the transaction there involved was not within the national jurisdiction. The question raised was solely as to whether that transaction was within the meaning of the national act. It is true that Mr. Justice White argued



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strenuously that it was not within that jurisdiction, but, with all due respect, I submit that he was in error here. The basis of his argument that the transaction attacked was not within the national jurisdiction was that the purchase by the Northern Securities Company of the capital stock of the two railway companies was not interstate commerce. That is undoubtedly true. But that circumstance was not sufficient to take the transaction out of such jurisdiction. If, though not itself interstate commerce, it related to and affected directly interstate commerce, then it was within that jurisdiction. That it did so is evident from the fact that it was a purchase of the stock of corporations whose property and the operation thereof was interstate. It was as much interstate as if one of the two competing corporations had purchased the capital stock or the property of the other.

I, therefore, conclude that, to no extent whatever, has the authority of the *Knight case* been affected by any of the later decisions of the Supreme Court.

Before quitting this branch of the case, it may be proper to show that the *Knight case* fits this case, though, as heretofore stated, it is practically conceded that it does. The Calumet & Hecla Company has not acquired the entire capital stock of the Osceola Company. It has not acquired the ownership of a majority of that stock. It has acquired the ownership of a portion, and the right to vote another [740] portion, the two together being a majority thereof. The business here involved is that of mining instead of refining sugar. Otherwise there is no difference between that case and this. The property of the Osceola Company and its operation is internal to the state of Michigan, as that of the Pennsylvania corporations was to that state. The differences in detail referred to do not call for a difference of decision. The conclusion must be reached, then, that the transaction complained of herein is not within the national act. If the Calumet & Hecla Company had purchased the property of the Osceola, or if that property had been held by a trustee for the benefit of its stockholders and the Calumet & Hecla Company had purchased the beneficial interests of the cestuis que trustent, certainly the transaction would not in either case have been within that act. No more can it be said that

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a purchase by it of the capital stock, or a majority thereof, or of a portion thereof and the right to vote another portion, the two together constituting a majority, is within it.

It seems to me that the existence of any difficulty in determining how this case ought to be decided, so far as this question is concerned, is due to the manner in which it is approached. If it is approached in an effort to reach a conclusion as to whether the transaction involved is within the meaning of the national act, it may be hard to dispose of it correctly. But if it is approached as the *Knight case* was approached by the judges of the different courts who rendered opinions, holding that the transaction attacked therein was not within that act, which was in an effort to reach a conclusion as to whether it was within the national jurisdiction, and consequently whether it could properly have been put within that act, no room for doubt as to how it ought to be decided will be left.

As indicated at the start, it is also claimed that the transaction involved here is within the state act. The claim that it is so is based largely, if not altogether, on the same line of reasoning upon which it is claimed to be within the national act. Indeed, on the one side, it seems to be claimed to be within the state act because it is within the national act, and, on the other hand, that is not within the state act because it is not within the national act. This, no doubt, is due to the fact that both sides of this case have approached it from the standpoint as to what is the true meaning of both acts, and not from the standpoint as to which jurisdiction—national or state—the transaction complained of is within. So approaching it, it was but natural to feel that the question whether that transaction was within the state act depended on whether it was within the national act. For the language of both acts is substantially similar, though that of the state act is somewhat more verbose. But approaching it from the proper standpoint, as I have claimed it to be, as soon as it is determined that the transaction in question is not within the national act, it is at once realized that it does not necessarily follow that because it is not within the one act it is not within the other. The transaction being within the state jurisdiction, and not within the national, it

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may well be within the state act, though not within the national. The question, then, as to whether it is within the state act hangs on whether [741] it is within the words thereof, construed in the light of the circumstance that the state had power to put it there.

So construing these words, how does the matter stand? The Calumet & Hecla Company and the Osceola Company were created and organized, and have ever since continued, to transact business under a general act of the state of Michigan providing for the incorporation of companies for mining, smelting, and manufacturing copper and other metals. By that act, any two or more corporations existing thereunder may consolidate. This court in the case of *Marbury v. Kentucky Union Land Co.*, 62 Fed. 335, 10 C. C. A. 393, held that an act authorizing two corporations to consolidate, also authorizes one to purchase the capital stock of the other, on the principle that the greater includes the less. But this was not the only authority that the Calumet & Hecla Company had to purchase the stock of the Osceola. By an amendment to that general act, approved May 10, 1905 (Pub. Acts 1905, p. 153, No. 105), a company organized thereunder was expressly authorized "to subscribe to, purchase, acquire and own" stock in any company organized thereunder. Neither the provision authorizing a consolidation or purchase of stock has ever been repealed or modified to any extent, unless it has been done by the anti-trust legislation. There are two anti-trust acts in Michigan, one approved June 23, 1899 (Pub. Acts 1899, p. 409, No. 255), and another, declared to be "supplementary to and declaratory of and in addition to" the earlier act, approved June 20, 1905 (Pub. Acts 1905, p. 507, No. 329). The original act was in existence at the time of the approval of said amendment of May 10, 1905, and the supplementary one was approved subsequent to its approval. The one is entitled "An act to prevent trusts, monopolies and combination," etc., and the other "An act relative to agreements, contracts and combinations in restraint of trade or commerce." It is not necessary to quote from the body of either act. Each contains general language in the line of its title. There is no express refer-

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ence to the legislation referred to as contained in said general act and the amendment thereto. It is not to be taken that it impliedly has reference thereto. That legislation and those acts can be construed together, and I think that within well-recognized principles they ought to be so construed. So construing them, it is not to be held that what the one expressly authorizes is denied by the other.

**[347] AMERICAN BANANA COMPANY v. UNITED FRUIT COMPANY.\***

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 686. Argued April 12, 13, 1909.—Decided April 26, 1909.

[213 U. S., 347.]

While a country may treat some relations between its own citizens as governed by its own laws in regions subject to no sovereign, like the high seas, or to no law recognized as adequate, the general rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where it is done.<sup>b</sup>

[348] Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts; but the word commonly is confined to such prophesies or threats when addressed to persons living within the power of the courts.

A statute will, as a general rule, be construed as intended to be confined in its operation and effect to the territorial limits within the jurisdiction of the lawmaker, and words of universal scope will be construed as meaning only those subject to legislation.

The prohibitions of the Sherman Anti-Trust Law of July 2, 1890, c. 647, 26 Stat. 209, do not extend to acts done in foreign countries even though done by citizens of the United States and injuriously affecting other citizens of the United States.

Sovereignty means that the decree of the sovereign makes law; and foreign courts can not condemn the influences persuading the sovereign to make the decree. *Rafael v. Verelst*, 2 Wm. Bl. 983, 1055, distinguished.

Acts of soldiers and officials of a foreign government must be taken to have been done by its order.

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\* For opinions of the lower courts (153 Fed. Rep. 943) see *ante*, p. 262; (160 Fed. Rep. 184), *ante*, p. 372; (166 Fed. Rep., 261) see *ante*, p. 563.

<sup>b</sup> Syllabus and statements of arguments copyrighted, 1909, by the Banks Law Publishing Company.

## Argument for Plaintiff in Error.

A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful if they are permitted by the local law.

166 Fed. Rep. 261, affirmed.

The facts are stated in the opinion.

*Mr. Everett P. Wheeler*, with whom *Mr. Horace E. Deming* was on the brief, for plaintiff in error.

The Circuit Court should have taken jurisdiction of this action. Section 7 of the Sherman Act expressly provides for the bringing of suits like the present one, "in any Circuit Court of the United States in the district in which the defendant resides or is found." See also § 2, Art. VI, Const. U. S. The suit at bar is a civil suit, arising under the laws of the United States and a treaty made under its authority. It is brought to recover for injuries done by defendant, and declared unlawful by the Sherman Act. The Circuit Court is a court of the United States and is bound to administer the jurisdiction conferred upon it.

No considerations of public policy or comity forbid the courts of the United States to exercise jurisdiction and decide this controversy on the merits.

[349] The acts complained of were done in violation of an express statute of the United States. Costa Rica cannot give immunity to defendant for this offense, nor can exceptions be read into the Sherman Act not expressed in the act itself. *United States v. Union Pacific*, 91 U. S. 72, 91; *French v. Spencer*, 21 How. 238; *Demarest v. Wynkoop*, 3 Johns. Ch. 129, 142; *S. P. Chamberlain v. The Western Transportation Co.*, 44 N. Y. 305, 309; *Bank of Republic v. City of St. Joseph*, 21 Blatch. 436, 439.

Whatever value the principles of comity may have, they can not be extended so far as to cloak a violation of the laws of the nation whose comity is appealed to. *The Santissima Trinidad*, 7 Wheat. 283, 354; *The Belle Corrúnes*, 6 Wheat. 152, 169; *The Marianna Flora*, 11 Wheat. 1; *The Merino*, 9 Wheat. 391, 405; *La Jeune Eugenie*, 2 Mason, 409; *Underhill v. Hernandez*, 65 Fed. Rep. 577, affirmed 168 U. S. 250,

## Argument for Plaintiff in Error.

discussed as not being in point. See also *People v. McLeod*, 25 Wend. 483.

The courts of this country can consider and collaterally pass upon the legality of acts of a foreign nation, in a suit between its own citizens. *Vasse v. Ball*, 2 Dall. 270, 275; 3 Kent's Comm. 303, 304; *The Santissima Trinidad*, 7 Wheat. 283, 351, 354; *The Estrella*, 4 Wheat. 298; *Angle v. Chicago, St. Paul &c. R. Co.*, 151 U. S. 119.

The extent of the rule is that a court can not sit in judgment on the act of a foreign power where that act is directly drawn in question in a suit directly against such foreign power, or against an officer acting within its territory under its commands. *Nabob of Arcot v. East India Co.*, 4 Brown Ch. 131 (180); *The Duke of Brunswick v. The King of Hanover*, 6 Beav. 1 (affirmed 2 H. of L. 1); *Hatch v. Baes*, 7 Hun, 596; *Rafael v. Verelst*, 2 Wm. Blackstone, 1055.

The supposed government authority under which the act is done is in itself invalid. The Costa Rican officers, in destroying plaintiff's property and business, were acting outside of the territory of Costa Rica, and were making an usurping inroad on the territory of an adjoining friendly power. 1 Kent's Comm. 120. In considering the defense that an act was done under authority [350] of government, the courts have uniformly held that such authority must be valid or lawful. Suit against an officer for an unlawful act is not a suit against his sovereign. *Poindexter v. Greenhow*, 114 U. S. 270, 290; *Osborn v. The Bank*, 9 Wheat. 738; *Ex parte Young*, 209 U. S. 123, 159; *Litchfield v. Bond*, 186 N. Y. 66; *People v. McLeod*, 25 Wend. 483.

An injury to the private property of a citizen by an officer of government is justiciable in the courts of the country of which he is a citizen, even if it be an act of state. *Baird v. Walker*, L. R. (1892) App. Cas. 491, overruling upon this point, *Buron v. Denman*, 2 Ex. 167, if susceptible of the interpretation put upon it by the District Judges. That case, however, is an authority for the plaintiff; and see *Feather v. The Queen*, 6 Best & Smith, 257, 296. See also *Little v. Barreme*, 2 Cranch, 170, 179; *Poindexter v. Greenhow*, 114 U. S. 270; *Entick v. Harrington*, 19 State Trials, 1043; *Money v. Leach*, 3 Burr. 1742, 1762.

## Argument for Plaintiff in Error.

It is never a defense, even to an officer who has committed a tort, that he has acted on behalf of his government under circumstances like those in this case. *A fortiori* it can be no defense to the citizens of the country against whose laws the tort was committed that it was done through the agency of such officer. *Duke of Brunswick's case*, 2 H. of L. 1; *Musgrave v. Pulido*, L. R. 5 App. Cas. 102, 112; 1 Goodnow. Comparative Administrative Law, 85, 86; *Moodaly v. Moreton & East India Co.*, 2 Dickens, 652.

Damage sustained by the plaintiff was inflicted in pursuance of defendant's illegal combination, and is therefore actionable under the statute. *United States v. Patterson*, 55 Fed. Rep. 605; *Shawnee Compress Co. v. Anderson*, 209 U. S. 423.

Defendant cannot complain because it alone is sued. Any member of such combination is liable for the acts of the combination, or any member of it, done in furtherance thereof. *Atlanta v. Chattanooga Foundry Co.*, 127 Fed. Rep. 23; *Chicago Coal Co. v. People*, 214 Illinois, 421, 423.

Acts done in pursuance of a combination are none the less done in pursuance thereof because done by only one member. [351] *United States v. Standard Oil Co.*, 152 Fed. Rep. 290; *Tobacco Trust case*, 149 Fed. Rep. 823; Cooley on Torts (3d ed.), 213.

The statute applies to acts done in a foreign country. The objection that the acts complained of were done abroad is entitled to no weight. The parties to the suit are American citizens. The commerce restrained by defendant's acts was foreign commerce of the United States. Congress has full power to legislate in respect to that and has exercised the power in this statute. *Gibbons v. Ogden*, 9 Wheat. 1; *United States v. Knight*, 156 U. S. 1.

Acts done by citizens of the United States are subject to its jurisdiction and legislative powers.

The commerce of the United States may by its statutes be protected from injury by acts done beyond its boundaries. Both of these powers have been frequently exercised and their validity is established in both criminal and civil cases. *United States v. Gordon*, 5 Blatch. 18; *The Slavers (Kate)*,

## Argument for Defendant in Error.

2 Wall. 350; *United States v. Pirates*, 5 Wheat. 184; *United States v. Rauscher*, 119 U. S. 407, 433; *Carib Prince*, 170 U. S. 655; *The Silvia*, 171 U. S. 462; *The Chattahoochee*, 173 U. S. 540.

The language of the Sherman Act is as comprehensive as that of the Harter Act. It is a rule prescribed by Congress for interstate and international commerce. It guards such commerce against acts which threaten it, no matter where they are done, and more especially if they are done by citizens of the United States. *Northern Securities case*, 193 U. S. 337; *Thomsen v. Union Castle Co.*, 166 Fed. Rep. 251.

This court has uniformly held in suits against common carriers that it would, in determining the validity of contracts made with them, or their liability for torts committed by them, apply the American and not the foreign law; and enforce the policy of American law. *Liverpool & G. W. Co. v. Phenix Ins. Co.*, 129 U. S. 397.

A State has the right to attach whatever consequences it chooses within its own territory to acts of its subjects, wherever [352] those acts may be done. Hall on Int. Law (5th ed.), 202; 1 Oppenheim, Int. Law, 195; Wharton, Crim. Law, § 271.

*Mr. Henry W. Taft* and *Mr. Moorfield Storey*, with whom *Mr. Walker B. Spencer* and *Mr. J. L. Thorndike* were on the brief, for defendant in error:

The plaintiff can not recover for any injury caused to its property or business by the acts of Costa Rica.

The allegations of the complaint make it clear that the plantation, railroad and goods of the plaintiff were seized by the officers and soldiers of Costa Rica, and that their action in making this seizure has been approved and possession of the seized property has since been retained by the government of that state acting in the exercise of its de facto sovereignty over the territory in which the seizure was made.

The acts complained of were the acts of Costa Rica, and the damage claimed was caused by those acts. Whether they were originally ordered or only approved and ratified is immaterial. *Buron v. Denman*, 2 Exch. 167; *Underhill v. Her-*



## Argument for Defendant in Error.

*nandez*, 168 U. S. 250, 252; Webb's Pollock on Torts, pp. 182, 187.

The statute and territorial jurisdiction of foreign states, their rights, powers and obligations, the rights and obligations of a citizen of the United States arising out of relations with a foreign government, and, conversely, the rights and obligations of a foreign state dealing with a citizen of the United States, are necessarily political questions, which, under the Constitution of this government, are confided exclusively to the executive branch of the government, and with them the judicial branch has no concern. *Kennett v. Chambers*, 14 How. 38, 51; *Williams v. Suffolk Insurance Co.*, 13 Peters, 415; *United States v. Holliday*, 3 Wall. 419; *Duke of Brunswick v. King of Hanover*, 2 H. L. C. 1 (same case below, 6 Beavan, 1; 13 L. J. Ch. 107); *Secretary of State v. Kamachee*, 13 Moore, Privy Council, 22 (same case, English Reports Reprint, Vol. 15, p. 9); *Buron v. Denman* (1848), 2 Ex. 167; *Feather v. Queen* (1865), 6 B. & S. 257; *Doss v. Secretary of State*, 19 Equity, 509.

[353] In this case the de facto sovereignty of Costa Rica is recognized by the State Department, and this recognition establishes the fact conclusively in the courts of the United States. It is immaterial whether Costa Rica had jurisdiction and sovereignty over this territory in dispute, or whether its attempt to exercise such jurisdiction was by legal right or was an act of war or aggression against the Republic of Panama. *Underhill v. Hernandez*, 168 U. S. at p. 252.

Redress for injuries caused to a citizen of a foreign nation by another nation through the exercise of de facto powers, even though maintained by means of force alone, can not be had in the courts of the offending nation without its consent. It can only be had in the forum of international relations.

The acts are alleged to have been done entirely in a foreign country, with which the Sherman Act has nothing to do.

The alleged acts of the defendant in inducing the acts of Costa Rica had no direct or indirect relation to commerce between Panama and the United States. They were acts committed in Costa Rica. Their tortious character does not

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alter the fact that their direct effect was on production and not on trade. The direct effect of the defendant's action was to injure production only. *United States v. E. C. Knight Co.*, 156 U. S. 1; *In Re Greene*, 52 Fed. Rep. 104; *Chesapeake & Ohio Fuel Co. v. United States*, 115 Fed. Rep. 623; *Coe v. Errol*, 116 U. S. 517; *Kidd v. Pearson*, 128 U. S. 1; *Dudley v. Briggs*, 141 Massachusetts, 582.

Mr. Justice HOLMES delivered the opinion of the court.

This is an action brought to recover threefold damages under the Act to Protect Trade against Monopolies. July 2, 1890, c. 647, § 7. 26 Stat. 209, 210. The Circuit Court dismissed the complaint upon motion, as not setting forth a cause of action. 160 Fed. Rep. 184. This judgment was affirmed by the Circuit Court of Appeals, 166 Fed. Rep. 261, and the case then was brought to this court by writ of error.

[354] The allegations of the complaint may be summed up as follows: The plaintiff is an Alabama corporation, organized in 1904. The defendant is a New Jersey corporation, organized in 1899. Long before the plaintiff was formed the defendant, with intent to prevent competition and to control and monopolize the banana trade, bought the property and business of several of its previous competitors, with provision against their resuming the trade, made contracts with others, including a majority of the most important, regulating the quantity to be purchased and the price to be paid, and acquired a controlling amount of stock in still others. For the same purpose it organized a selling company, of which it held the stock, that by agreement sold at fixed prices all the bananas of the combining parties. By this and other means it did monopolize and restrain the trade and maintained unreasonable prices. The defendant being in this ominous attitude, one McConnell in 1903 started a banana plantation in Panama, then part of the United States of Colombia, and began to build a railway, (which would afford his only means of export), both in accordance with the laws of the United States of Colombia. He was notified by the defendant that he must either combine or stop. Two months later, it is believed at the defendant's instigation, the

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governor of Panama recommended to his national government that Costa Rica be allowed to administer the territory through which the railroad was to run, and this although that territory had been awarded to Colombia under an arbitration agreed to by treaty. The defendant, and afterwards, in September, the Government of Costa Rica, it is believed by the inducement of the defendant, interfered with McConnell. In November, 1903, Panama revolted and became an independent republic, declaring its boundary to be that settled by the award. In June, 1904, the plaintiff bought out McConnell and went on with the work, as it had a right to do under the laws of Panama. But in July, Costa Rican soldiers and officials, instigated by the defendant, seized a part of the plantation and a cargo of supplies and have held them ever since, and stopped the construction and operation [355] of the plantation and railway. In August one Astua, by ex parte proceedings, got a judgment from a Costa Rican court, declaring the plantation to be his, although, it is alleged, the proceedings were not within the jurisdiction of Costa Rica, and were contrary to its laws and void. Agents of the defendant then bought the lands from Astua. The plaintiff has tried to induce the Government of Costa Rica to withdraw its soldiers and also has tried to persuade the United States to interfere, but has been thwarted in both by the defendant and has failed. The Government of Costa Rica remained in possession down to the bringing of the suit.

As a result of the defendant's acts the plaintiff has been deprived of the use of the plantation, and the railway, the plantation and supplies have been injured. The defendant also, by outbidding, has driven purchasers out of the market and has compelled producers to come to its terms, and it has prevented the plaintiff from buying for export and sale. This is the substantial damage alleged. There is thrown in a further allegation that the defendant has "sought to injure" the plaintiff's business by offering positions to its employees and by discharging and threatening to discharge persons in its own employ who were stockholders of the plaintiff. But no particular point is made of this. It is contended however that, even if the main argument fails

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and the defendant is held not to be answerable for acts depending on the co-operation of the Government of Costa Rica for their effect, a wrongful conspiracy resulting in driving the plaintiff out of business is to be gathered from the complaint and that it was entitled to go to trial upon that.

It is obvious that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other States. It is surprising to hear it argued that they were governed by the act of Congress.

No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as [356] adequate, such countries may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive. See *The Hamilton*, 207 U. S. 398, 403. *Hart v. Gumpach*, L. R. 4 P. C. 439, 463, 464. *British South Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602. They go further, at times, and declare that they will punish any one, subject or not, who shall do certain things, if they can catch him, as in the case of pirates on the high seas. In cases immediately affecting national interests they may go further still and may make, and, if they get the chance, execute similar threats as to acts done within another recognized jurisdiction. An illustration from our statutes is found with regard to criminal correspondence with foreign governments. Rev. Stat. § 5335. See further *Commonwealth v. Macloon*, 101 Mass. 1. *The Sussex Peerage*, 11 Cl. & Fin. 85, 146. And the notion that English statutes bind British subjects everywhere has found expression in modern times and has had some startling applications. *Rex v. Sawyer*, 2 C. & K. 101. *The Zollverein*, Swabey, 96, 98. But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. *Slater v. Mexican National R. R. Co.*, 194 U. S. 120, 126. This principle was carried to an extreme in *Milliken v. Pratt*, 125 Mass. 374. For another jurisdiction, if it should happen to lay hold of the actor, to

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treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other State concerned justly might resent. *Phillips v. Eyre*, L. R. 4 Q. B. 225, 239. L. R. 6 Q. B. 1, 28. Dicey, *Conflict of Laws*, 2d ed. 647. See also Appendix, 724, 726, Note 2, *ibid*.

Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts. But the word commonly is confined to such prophecies or threats when addressed to persons living within the power of [357] the courts. A threat that depends upon the choice of the party affected to bring himself within that power hardly would be called law in the ordinary sense. We do not speak of blockade running by neutrals as unlawful. And the usages of speech correspond to the limit of the attempts of the law-maker, except in extraordinary cases. It is true that domestic corporations remain always within the power of the domestic law, but in the present case, at least, there is no ground for distinguishing between corporations and men.

The foregoing considerations would lead in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. "All legislation is prima facie territorial." *Ex parte Blain, In re Sawers*, 12 Ch. Div. 522, 528. *State v. Carter*, 27 N. J. (3 Dutcher,) 499. *People v. Merrill*, 2 Parker, Crim. Rep. 590, 596. Words having universal scope, such as "Every contract in restraint of trade," "Every person who shall monopolize," etc., will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator subsequently may be able to catch. In the case of the present statute the improbability of the United States attempting to make acts done in Panama or Costa Rica criminal is obvious, yet the law begins by making criminal the acts for which it gives a right to sue. We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present

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suit is concerned. Other objections of a serious nature are urged but need not be discussed.

For again, not only were the acts of the defendant in Panama or Costa Rica not within the Sherman Act, but they were not torts by the law of the place and therefore were not torts at all, however contrary to the ethical and economic postulates of that statute. The substance of the complaint is that, the plantation being within the de facto jurisdiction of Costa Rica, that State took and keeps possession of it by virtue of its sovereign power. But a seizure by a State is not a thing that can be [358] complained of elsewhere in the courts. *Underhill v. Hernandez*, 168 U. S. 250. The fact, if it be one, that de jure the estate is in Panama does not matter in the least; sovereignty is pure fact. The fact has been recognized by the United States, and by the implications of the bill is assented to by Panama.

The fundamental reason why persuading a sovereign power to do this or that can not be a tort is not that the sovereign can not be joined as a defendant or because it must be assumed to be acting lawfully. The intervention of parties who had a right knowingly to produce the harmful result between the defendant and the harm has been thought to be a non-conductor and to bar responsibility, *Allen v. Flood*, [1898] A. C. 1, 121, 151, etc., but it is not clear that this is always true, for instance, in the case of the privileged repetition of a slander, *Elmer v. Fessenden*, 151 Mass. 359, 362, 363, or the malicious and unjustified persuasion to discharge from employment. *Moran v. Dunphy*, 177 Mass. 485, 487. The fundamental reason is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts can not, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law. See *Kawanakoa v. Polyblank*, 205 U. S. 349, 353. In the case of private persons it consistently may assert the freedom of the immediate parties to an injury and yet declare that certain

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persuasions addressed to them are wrong. See *Angle v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 151 U. S. 1, 16-21. *Fletcher v. Peck*, 6 Cranch, 87, 130, 131.

The plaintiff relied a good deal on *Rafael v. Verelst*, 2 Wm. Bl. 983. Ibid. 1055. But in that case, although the Nabob who imprisoned the plaintiff was called a sovereign for certain purposes, he was found to be the mere tool of the defendant, an English Governor. That hardly could be listened to concerning a really independent State. But of course it is not alleged [359] that Costa Rica stands in that relation to the United Fruit Company.

The acts of the soldiers and officials of Costa Rica are not alleged to have been without the consent of the government and must be taken to have been done by its order. It ratified them, at all events, and adopted and keeps the possession taken by them. *O'Reilly de Camara v. Brooke*, 209 U. S. 45, 52. *The Paquete Habana*, 189 U. S. 453, 465. *Dempsey v. Chambers*, 154 Mass. 330, 332. The injuries to the plantation and supplies seem to have been the direct effect of the acts of the Costa Rican Government, which is holding them under an adverse claim of right. The claim for them must fall with the claim for being deprived of the use and profits of the place. As to the buying at a high price, etc., it is enough to say that we have no ground for supposing that it was unlawful in the countries where the purchases were made. Giving to this complaint every reasonable latitude of interpretation we are of opinion that it alleges no case under the Act of Congress and discloses nothing that we can suppose to have been a tort where it was done. A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law.

Further reasons might be given why this complaint should not be upheld, but we have said enough to dispose of it and to indicate our general point of view.

Judgment affirmed.

Mr. Justice HARLAN concurs in the result.

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**[396] PEOPLE'S TOBACCO CO., LIMITED, v. AMERICAN TOBACCO CO. ET AL.\***

(Circuit Court of Appeals, Fifth Circuit. May 3, 1909.)

[170 Fed. Rep., 396.]

**MONOPOLIES (§ 28)—CONSPIRACY IN RESTRAINT OF INTERSTATE COMMERCE—ACTION FOR DAMAGES.**—A petition to recover threefold damages for injury to plaintiff's business in interstate and foreign commerce, under Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), states a cause of action, where it alleges that plaintiff was a manufacturer of tobacco which it sold in interstate and foreign commerce, and facts showing that defendants conspired to render its business unprofitable and ruin and destroy the same through competing corporations, which they secretly controlled, by enticing away its workmen, by compelling it to pay more than the normal price for leaf tobacco, and to adopt unnecessary and expensive means to sell its products, and that such conspiracy was carried out to the damage of plaintiff in a sum stated; such acts constituting both a conspiracy to restrain interstate commerce and an attempt to monopolize the same, in violation of sections 1 and 2 of the act.<sup>b</sup>

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.]

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

Omitting the several letters and other exhibits referred to, the following are all the averments and statements of the plaintiff's petition filed in the court below:

"The petition of the People's Tobacco Company, Limited, a corporation organized under and created by the laws of the state of Louisiana, domiciled in the parish of Orleans, state of Louisiana, and a citizen of said state, in the Eastern district thereof, and a resident of said state, through J. Oury, its president, respectfully represents:

"That the American Tobacco Company, a corporation organized under and created by the laws of the state of New Jersey, and a citizen of the state of New Jersey, the Craft Tobacco Company, Limited, a corporation organized under and created by the laws of the state of Louisiana, and a citizen of Louisiana, domiciled and doing business in the parish of Orleans, in said state, and Augustus Craft, a citizen of the state of Louisiana, residing in New Orleans, La.,

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\* Rehearing denied June 7, 1909.

<sup>b</sup> Syllabus copyrighted, 1909, by West Publishing Company.



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within the Eastern district of the state of Louisiana, are indebted unto your petitioner, in solido, in the sum of \$234,000 for this, to wit:

"That your petitioner was organized and created under the laws of the state of Louisiana on June 20, 1890, by an act passed before Edward Dinkelspiel, a notary public for the parish of Orleans, La., for the purposes to be hereinafter set forth:

"That on or about the 7th day of January, 1890, the American Tobacco Company was organized and created under the laws of the state of New Jersey.

"That a corporation known as the American Tobacco Company was organized and created for the purpose of taking over the control and controlling interest in certain corporations and firms and absorbing the business of said concerns; said corporation being formed with a capital stock of \$25,000,000, being \$10,000,000 of preferred stock and \$15,000,000 of common stock, and said corporation taking over the business of the following concerns and distributing its stock therefor as follows:

|                          | Preferred.  | Common.     | Total.      |
|--------------------------|-------------|-------------|-------------|
| Allen & Ginter.....      | \$3,000,000 | \$4,500,000 | \$7,500,000 |
| W. Dukes' Sons & Co..... | 3,000,000   | 4,500,000   | 7,500,000   |
| Kinney Tobacco Co.....   | 2,000,000   | 3,000,000   | 5,000,000   |
| W. S. Kimball Co.....    | 1,000,000   | 1,500,000   | 2,500,000   |
| Goodwin & Co.....        | 1,000,000   | 1,500,000   | 2,500,000   |

[397] "Your petitioner shows: That the articles of incorporation declare the purpose of the company to be to carry on its operations in all the other states and territories of the United States and in Great Britain and all foreign countries.

"That the said charter was amended in 1901, and by said amendment the American Tobacco Company was given the power to guarantee the securities of other corporations. That the first board of directors was composed of James B. Duke, B. N. Duke, George Arents, and George W. Watts, who have remained thereon continuously, and William H. Butler, Charles G. Emery, Lewis Ginter, Francis S. Kinney, William S. Kimball, and John Pope. That each of said directors owned an interest and participated in managing one of the acquired concerns. That about 1891 and subsequently the American Tobacco Company began to enter into contracts, combinations, and conspiracies in unlawful restraint of trade in leaf tobacco and manufactured tobacco and cigarettes, oppressing with ferocious competition and unfair trade measures, forcing competitors to sell their manufactories, business, trade brands, and the controlling interest in such rival corporations and good will, and using the names of said corporations for the purpose of organizing more successfully against its remaining competitors, and thus fighting and destroying them. That said American Tobacco Company as then organized, called in this petition

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the old American Tobacco Company, and the American Tobacco Company as now organized, concealed and conceals its ownership and control of acquired companies and brands for the purpose of crippling existing competitors. That the charges made against the American Tobacco Company in this cause are also true of the Consolidated Tobacco Company, and the Continental Tobacco Company, mentioned hereinafter.

"Your petitioner shows that the Continental Tobacco Company was formed in December, 1898, with a capital of \$75,000,000, which capital stock was increased on April 21, 1899, to \$100,000,000. That the charter of said corporation recited:

"The objects for which this corporation is formed are to cure leaf tobacco, and to buy, manufacture, and sell tobacco in any and all its forms, and to erect and otherwise acquire factories and buildings, establish, maintain, and operate factories, warehouses, agencies, and depots for the storing, preparation, cure, and manufacture of its tobacco, and for its sale and distribution, and to transport or cause the same to be transported as an article of commerce, and to do any and all things incidental to the business of trading and manufacturing aforesaid.

"This corporation shall have the power to conduct its business, or any portion of it, in all other states and territories, colonies and dependencies of the United States, and in Great Britain and Canada, and all other foreign countries, to have one or more offices out of the state of New Jersey, and to hold, purchase, lease, mortgage, and convey real and personal property out of the state of New Jersey as well as in said state. That said charter was amended on or about April 20, 1901, and by said amendment the corporation was given the further power to indorse or otherwise guarantee the principal or interest, or both, of and on any bonds, debentures, or promissory notes that may be made, issued, or uttered by any corporation in which said company has a substantial interest as stockholder, provided that authority for such indorsement or guaranty be first obtained from the board of directors by resolution having the favorable vote of at least two-thirds of the whole board. That James B. Duke and John B. Cobb were among the incorporators with James B. Duke as president.

"That in June, 1901, in pursuance of the general scheme and purposes heretofore described to secure the retirement of competition, hinder and restrain foreign and interstate commerce in tobacco and its products, exclude others therefrom, and acquire therein a monopoly, the directors, officers, and stockholders of the American Tobacco Company, and the Continental Tobacco Company, caused to be organized under the laws of New Jersey the Consolidated Tobacco Company, with a capital stock of \$30,000,000, which capital was afterwards increased to \$40,000,000.

"The objects for which the said corporation was formed is shown by the charter to be as follows:

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[898] "To dry and cure leaf tobacco, to buy, manufacture, sell and otherwise deal in tobacco and the products of tobacco in any and all forms.

"To construct or otherwise acquire and hold, own, maintain and operate warehouses, factories, offices and other buildings, structures and appliances for the drying, curing, storing, manufacture, sale and distribution of tobacco and its products. To purchase or otherwise acquire and hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of the shares of capital stock of, or any bonds, security or other evidences of indebtedness created by any other corporation of this or any other state or government, and to issue its own obligations in payment or in exchange therefor, or for any purpose of its incorporation, and to secure such obligations by pledge or mortgage under deed of trust or otherwise of the shares of capital stock or bonds, securities or other evidences of indebtedness so acquired, or of any other property of the corporation.

"To guarantee dividends on any shares of the capital stock of any corporation in which this corporation has any interest as stockholder, and to indorse or otherwise guarantee the principal and interest, or either, of any bonds, securities or other evidences of indebtedness created by any corporation in which this corporation has such an interest, provided that authority for any such indorsement or guarantee be first given by resolution adopted by at least two-thirds of the whole board of directors of this corporation.

"To carry on any business operation deemed by the corporation to be necessary or advisable in connection with any of the objects of its incorporation or in furtherance of any thereof, or tending to increase the value of its property. \* \* \*

"The said consolidated Tobacco Company was given by its charter the right to do business in all states and territories of the United States and in foreign countries. The stock was subscribed by few individuals closely associated with the management of the old company. James B. Duke was at all times president, Thomas F. Ryan, John B. Cobb, and C. C. Dula were vice presidents, and the board of directors was composed of directors of the old company.

"Your petitioner further shows that on or about September 9, 1904, the management of the said American Tobacco Company, the Consolidated Tobacco Company, and the Continental Tobacco Company formed an agreement by which they were to take over the interest and business of each of the said named companies, and at the same time take over their controlling interests in all subsidiary corporations, the whole to be contained in and owned by a corporation known as the American Tobacco Company, one of the defendants in this case, all of which will more fully and at large appear by reference to a copy of said agreement annexed to this petition and made part hereof, marked 'Exhibit A.'

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"That said American Tobacco Company was formed into a corporation in October, 1904, with James B. Duke as president, and John B. Cobb, C. C. Dula, William R. Harris, and Percival S. Hill, vice presidents. That all the property of the merged companies became the property of the American Tobacco Company now operating branches under its own name and in the name of different corporations owned and controlled by it in Richmond, Va., Newport News, Va., New Orleans, La., New York City, Louisville, Ky., and other cities. That said American Tobacco Company, acting in its own name, owns and controls a great number of incorporate institutions and dictates the election of their directors. That defendant and all subsidiary corporations are engaged in interstate and foreign commerce.

"Now your petitioner shows that your petitioner was organized as aforesaid for the purpose of carrying on a general cigar, cigarette, and tobacco business, including manufacturing, buying, selling, and exporting tobacco to foreign countries, and carrying on of said business throughout the world, and since its organization has carried on an extensive interstate and foreign business, selling its products in New York, Texas, Illinois, New Mexico, Arizona, and in the Republic of Mexico.

"Your petitioner further shows: That among its stockholders was Augustus Craft, who owned 50 shares of the capital stock in your petitioner, and was a director of your petitioner, and who afterwards acquired one share of stock from one Grabenheimer, thus becoming the owner of 51 shares, or a controlling interest in your petitioner. That on or about June 9, 1900, said Craft sold to J. Oury 25 shares of the capital stock of the People's Tobacco Company, Limited, as your petitioner was losing money in getting its enterprise under way, and on or about the 21st day of November, 1902, said Craft having familiarized himself with your petitioner's business, sold to J. Oury, president of your petitioner, his remaining 26 shares. That shortly after the said Craft had parted with his interest in your petitioner's business, conspiring with and acting under the advice and controlling management of the Consolidated Tobacco Company, the Continental Tobacco Company, and the old American Tobacco Company, before the consolidation of the said three companies, and for the purpose of defeating your petitioner's business, and in the interest of the said companies, which were consolidated for the purpose of restraining trade and cutting off competition by every unlawful means and at the suggestion of the said companies and of Caleb C. Dula, who with Percival S. Hill were the principal agents of the said companies for the purpose of destroying rival concerns, organized the Craft Tobacco Company, Limited, which corporation was created on or about the 14th day of May, 1903, under the laws of the state of Louisiana by notarial act before Felix J. Dreyfus, notary public. That the business was to become a going concern when 50

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shares were subscribed. That said Craft subscribed for 42 shares of stock; Everett G. Lawrence, 2 shares; Louis P. Rice, 2 shares; Pearl Wight, 1 share; J. Watts Kearney, 1 share; J. A. Blaffer, 1 share; and Luther Sextin, 1 share. That on May 15, 1903, said Craft wrote to Caleb C. Dula that he held \$10,000 of the stock and that the whole \$50,000 was paid in and in bank.

"Now your petitioner alleges and charges: That the \$50,000 or three-fourths thereof was furnished by the Continental Tobacco Company, the Consolidated Tobacco Company, and the old American Tobacco Company, or one of them. Your petitioner shows that the stockholders of said Craft Tobacco Company, Limited, and the directors, except said Craft, were mere figureheads, or persons interposed to deceive the public as to the real ownership of said corporation. That it was provided in the charter of said corporation that the directors could be removed at any time by the stockholders at a meeting called by a majority of said stockholders.

"Your petitioner further shows that the stock in said corporation after the signing of said corporation and the payment of the sums of money subscribed thereto was held in the following proportions: Augustus Craft, 25 per cent; the Consolidated Tobacco Company, the old American Tobacco Company, and the Continental, or one or two of these companies, owning the remaining 75 per cent, but that it is impossible to say exactly how this stock was held, as the officers of the American Tobacco Company, the successor of the foregoing three companies, deny under oath knowing how the said stock was and is held, but admit that it was controlled by the American Tobacco Company and the composing companies.

"Now your petitioner shows that after the first three years of its creation, through industry and skillful management and extensive advertising, it built up a large business notwithstanding the expenses incidental to starting such business, and after certain losses succeeded in making in the year ending June 15, 1902, the sum of \$19,497.36.

"That in the next year, ending June 15, 1903, owing to your petitioner having established a trade, particularly that part of the laboring class belonging to unions, as your petitioner employed none but union men and catered to that particular class, your petitioner's net profits for the said year increased to the sum of \$40,282.83. That it was then that the Consolidated Tobacco Company, the Continental Tobacco Company, and the old American Tobacco Company, or one or two of them, conspired as aforesaid with said Augustus Craft for destroying said petitioner's business, and created the said Craft Tobacco Company, Limited. That said companies, or one or two of them, and the said Craft undertook the formation of the said Craft Tobacco Company, Limited, to take away your petitioner's hands, and on or about May 6, 1903, said Craft communicated with petitioner's foreman, tobacco cutter, and engineer, and on May 21, 1903, notified Percival S. Hill, in charge of said companies, that he had the head

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engineer and foreman of the People's Tobacco Company with him and expected to draw his labor supply from the People's. That said company has also attempted and undertook to cause strikes at said time among your petitioner's employes. That said Craft, through the bribery of the labor agent, by giving him a commission upon machinery, undertook to deceive the labor unions of New Orleans into the belief that he was in no wise connected with said companies now consolidated with the American Tobacco Company; the said labor unions at said time having already refused to have anything to do with said companies as being monopolies or trusts in restraint of trade. That at said time your petitioner was the only tobacco company in New Orleans which had the union trade and the union label, and the said three above-mentioned companies, to wit, the old American Tobacco Company, the Continental Tobacco Company, and the Consolidated Tobacco Company, were forbidden the use of the union label.

"Your petitioner shows that it was understood between the American Tobacco Company and the said Augustus Craft that said Craft was not to interfere with the Louisiana Tobacco Company and the Irby Tobacco Company, but was to confine his business to securing your petitioner's customers.

"Your petitioner further shows: That, as soon as the said Craft Tobacco Company had secured the union label and union labor as aforesaid in 1903, the American Tobacco Company, the Continental Tobacco Company, and the Consolidated Tobacco Company, or one or two of them, began to arrange, and did arrange, through their various subsidiary corporations, particularly the Craft Tobacco Company, Limited, for giving rebates to customers by giving a package of cigarettes for the return of 20 covers. That, the said acts of said companies having been forbidden by governmental officials, they put in prize coupons in the cigarettes sold by the said Craft Tobacco Company, Limited, thus holding out a further inducement to your petitioner's customers to buy tobacco from them through the Craft Tobacco Company, Limited, and after all of said acts and other acts hereinafter mentioned on the part of said company, and by reason thereof, your petitioner's business fell off from \$40,282.83, net profit from July 8, 1902, to June 1, 1903, to \$20,563.40, from June 1, 1903, to June 1, 1904; and to \$13,934.91 from June 1, 1904, to June 1, 1905; and to \$8,017.59 from June 1, 1905, to June 1, 1906. That on or about December 14, 1904, the American Tobacco Company, through Nathaniel Dorth and others, conspired to destroy and did destroy in same manner your petitioner's black leaf business.

"Your petitioner shows: That in June, 1905, your petitioner, realizing that its business was being driven out by the Craft Tobacco Company, Limited, particularly, and by the Louisiana Tobacco Company and the Irby Tobacco Company, both of said corporations being controlled and owned by defendant American Tobacco Company and its comprising companies, but at that time knowing of no conspiracy

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of collusion between the said Craft Tobacco Company, Limited, the Continental Tobacco Company, the Consolidated Tobacco Company, and the old and new American Tobacco Companies, began issuing, in self-defense, one-quarter cent coupons in its tobacco packages and half-cent coupons in its cigarettes in June, 1905. That in order to compete with said companies from June, 1905, to December, 1907, your petitioner spent on said coupons the sum of \$61,074.00, but that through the use of said coupons, and because of the advocacy of high license by Augustus Craft in the city council, of which he was a member, the business of the Craft Tobacco Company, Limited, began to fall off, and, its usefulness to said American Tobacco Company being at an end, your petitioner is informed and believes and charges that the American Tobacco Company, made defendant in this case, in the latter part of the year of 1907, sold its stock back to Augustus Craft.

"Your petitioner shows: That its expenses for sale, and outside of the cost of manufacturing, amounted during the fiscal year from July, 1902, to July, 1903, to \$9,617.18. That said expenses from June 1, 1903, to June 1, 1904, amounted to \$7,012.15. That its expenses from June 1, 1904, to June 1, 1905, amounted to \$9,948.31. That its expenses from June 1, 1905, to June 1, 1906, amounted to \$22,451.90. That its expenses from June 1, 1906, to June 1, 1907, amounted to \$24,751.84. That these expenses do not include the expenses of manufacture, among which is included the cost of coupons, already stated.

"Your petitioner shows that the management of the Craft Tobacco Company, Limited, was left by the corporation or corporations owning a controlling interest therein to Caleb C. Dula and Percival S. Hill for the better carrying into effect their illegal operations, schemes, and combinations against the interstate commerce, and that the acts of said Hill and said Dula were the acts of the corporation.

"Your petitioner further alleges that, where it is charged in this petition that said P. S. Hill or C. C. Dula did or performed any act, it is meant and charged that the said Percival S. Hill and Caleb C. Dula, acting for and in behalf of the Continental Tobacco Company, the Consolidated Tobacco Company, or the old American Tobacco Company, or after the month of October, 1904, were acting in behalf of the interest of the American Tobacco Company made defendant in this case.

"Your petitioner shows: That the Continental Tobacco Company in 1903 secretly bought out the Pinkerton Tobacco Company at Zanesville, Ohio, and by secret correspondence, letters being addressed by John W. Pinkerton, the manager of the Pinkerton Tobacco Company, and its president, to the American Tobacco Company under the assumed name of J. P. Williams, Madison Square, New York. That, in order better to carry out their purposes, often herein described, certain companies belonging to the Continental Tobacco Company, the Consolidated Tobacco Company, and the old and new American Tobacco

## Statement of the Case.

Company, among others, the American Snuff Company, the American Cigar Company, R. J. Reynolds Tobacco Company, R. A. Patterson Tobacco Company, Standard Snuff Company, Pinkerton Tobacco Company, F. R. Penn Tobacco Company, Night & Day Tobacco Company, Wells Whithead Tobacco Company, Nail & Williams Tobacco Company, and others, were made to maintain separate purchasing and sales departments with agents to purchase and solicit trade for them in many different states, and through them the said companies buy supplies of leaf tobacco and sell and distribute their products as a part of interstate trade and commerce, and that all said companies, either directly or indirectly, report to the American Tobacco Company, which, under agreements and a general plan of operation chiefly through P. S. Hill and C. C. Dula, decide how and where said companies may operate and fix prices stifling interstate competition.

"Your petitioner further shows: That through the said R. J. Reynolds Tobacco Company, the American Tobacco Company, and its composing companies, particularly the Consolidated Tobacco Company and the Continental Tobacco Company, have acquired the majority of the capital stock of the Lipfert Scales Company, preserving its authorization and corporate name, but in combination and agreement refrain from competing with said company, restraining interstate commerce, and intending to monopolize same. That said R. J. Reynolds Tobacco Company holds the majority of capital stock of the Andrews & Forbes Company and of the Amsterdam Supply Company, and other companies for the same purpose.

"Your petitioner further shows: That in February, 1903, the Continental Tobacco Company secretly acquired the control of Nail & Williams Tobacco Company, a Kentucky corporation long engaged in Louisville, Ky., successfully in interstate commerce and in leaf manufactured tobacco, drying tobacco leaf in different states, and selling, shipping, and distributing the products manufactured therefrom throughout the United States and abroad in competition with said company and the American Tobacco Company. That the owners and persons interested agreed with the American Tobacco Company not to engage in trade and commerce in tobacco or its products. That the separate organization of the acquired company has been preserved, but that the directors have at all times since been selected by the Continental Tobacco Company and the American Tobacco Company, and its business has been conducted under an agreement with them not to compete in the purchase of leaf tobacco or in the sale or distribution of its product and in combination with them and without competition for the purpose and with the effect of restraining interstate commerce and foreign trade and creating a monopoly therein. Said Nail & Williams Company have concealed and denied, and is now concealing and denying, its association with the American Tobacco Company, and has been used by the American Tobacco Company and the Continental Tobacco Company from May, 1903, to the



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latter part of May, 1907, as agent of supply to destroy competition. That said company during said time furnished to the Craft Tobacco Company [402] certain brands of tobacco at a low rate, lower than said tobacco could be bought elsewhere, for the purpose of destroying your petitioner's business, which not only extended to Louisiana, but to all of the adjoining states and foreign countries, all of which will more fully appear by reference to copy of an extract of a letter of Augustus Craft to C. C. Dula, dated May 6, 1903, and the extract of a letter from Augustus Craft to Percival S. Hill, dated August 21, 1903, to be hereafter annexed to this petition, and made part hereof for greater certainty.

"Your petitioner shows that the tobacco furnished to the Craft Tobacco Company was furnished by the present American Tobacco Company and Continental Tobacco Company and the Consolidated Tobacco Company, from the Nail & Williams Tobacco Company, their agents as aforesaid at Louisville, Ky., and from other states, at a cheaper rate than your petitioner, who is also engaged in interstate commerce, could buy on the market, said discriminating rate being made for the purpose of injuring your petitioner, who was also engaged in interstate commerce, all of which will more fully and at large appear by reference to a copy of a letter dated August 10, 1903, written by P. S. Hill, vice president of the American Tobacco Company and managing director of said company and of the Consolidated Tobacco Company and the Continental Tobacco Company, to be hereafter annexed to this petition, said letter being written to Augustus Craft.

"Your petitioner shows: That defendant's schemes and purposes were conducted in secrecy, and even the correspondence between the said Augustus Craft and C. C. Dula and P. S. Hill, in their capacities as vice president and managers aforesaid, being conducted under an assumed name, the said Craft in 1903 going under the name of Mrs. E. G. Craft, and afterwards of Mrs. Elvira Gustine, and the said P. S. Hill assuming the name and address of Helen V. Simmonds, at 306 Dolphin street, Baltimore, Md., and said Dula assuming the name and address of D. C. Williams, Madison Square Station, New York, all of which will more fully and at large appear by reference to substantial copies of extracts of said letters dated June 8, 1903, September 2, 18, and 23, 1903, from Augustus Craft to P. S. Hill, as agent of said companies, and a letter of C. C. Dula to Augustus Craft of May 14, 1903, and a letter of P. S. Hill, as agent of the American Tobacco Company to Augustus Craft, dated November 7, 1904, to be hereafter annexed to this petition for greater certainty.

"That the old American Tobacco Company, the Continental Tobacco Company, and the Consolidated Tobacco Company, or one or two or them, on or about June 8, 1903, conspired to procure the same kind of cigarette paper as was used by your petitioner, instead of Rislax, the better to prevent buyers from connecting said Craft Com-

## Statement of the Case.

pany with said company, all of which will more fully and at large appear from copies of extracts from letters written by Augustus Craft to Percival S. Hill, June 8, 1903, and July 24, 1903. That, when Rislax paper was used, said Craft and said Dula, on or about May 16, 1903, and before said date, gave out to the public that any one could buy said paper on the market at a reasonable price, all of which will more fully and at large appear by reference to a letter of Augustus Craft to C. C. Dula, dated May 16, 1903, to be hereafter annexed to this petition for greater certainty.

"That the purchase of tobacco by Augustus Craft for the Craft Tobacco Company, Limited, on or about the 7th of November, 1902, and the latter periods, was partially carried on through a broker to prevent the public from gaining knowledge of true ownership or control of the Craft Tobacco Company. That in July, 1903, Percival S. Hill, in his capacity of vice president and managing director and agent in shipping tobacco to the Craft Tobacco Company and other articles, was requested to destroy the marks contained thereon for the same purpose, all of which will more fully and at large appear by reference to copies of letters written by Augustus Craft to Percival S. Hill, dated July 18 and 24, 1903, to be hereafter annexed for greater certainty.

"Your petitioner shows: That at said time, in order to conceal its objects from the public, to wit, the destruction of petitioner's domestic and interstate business, it was planned to have the Irby Tobacco Company, a well-known branch of the American Tobacco Company, to pretend to be opposed to the Craft Tobacco Company, Limited.

[408] "That your petitioner used union labor exclusively in its factory and store, and, as already stated, the unions had long since refused to buy goods that did not contain the union label and to buy of the corporations which now compose the American Tobacco Company, and that one of the principal objects of the Craft Tobacco Company, by defendant and the companies which composed it, was to fight your petitioner by securing said trade, the object being particularly the destruction of a large business which your petitioner had built up in Louisiana and adjoining states and in foreign countries, all of which will more fully and at large appear by reference to letters of Augustus Craft to P. S. Hill, acting as agent aforesaid, dated June 20, 1903, July 17, 1903, July 24, 1903, August 21, 1903, September 23, 1903, copies of extracts of which to be hereafter annexed for greater certainty.

"Your petitioner shows that under the management of the said Hill and said Dula, conspiring with said Craft, the Louisiana Tobacco Company, Limited, owned by defendant and formerly one or more of the companies composing defendant, and the W. R. Irby Tobacco Company, a branch of the American Tobacco Company, owned by defendant and formerly by the Continental Tobacco Company, were kept in ignorance of the purposes or management of the American

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Tobacco Company, or at least it was so pretended to said Craft, all of which will more fully and at large appear by reference to copy of extracts from letters of Augustus Craft to Percival S. Hill, dated May 21, 1903, and August 21, 1903, and extract from a letter of Percival S. Hill to Augustus Craft, dated July 23, 1903, to be hereafter annexed to this petition and made part hereof for greater certainty.

"Your petitioner further shows that during the year 1903, up to January 1, 1907, and all during the period in which the controlling interest of the Craft Tobacco Company, Limited, was held by defendant and composing companies, or one or two of them, your petitioner's goods were discriminated against in its Louisiana business as well as in its interstate and foreign commerce. Your petitioner alleges and charges: That August Glandot and H. Guenard were paid by said company, through one Wackerbarth, up to the year 1901, and through agents unknown to your petitioner after said date, not to advertise or expose for sale your petitioner's goods; the said Glandot receiving his rent free for that consideration. That A. A. Merrick and one Keith and other peddlers received a bonus from the Continental Tobacco Company not to sell petitioner's goods.

"Your petitioner further shows: That the Louisiana Tobacco Company and the Irby Tobacco Company and other agents of defendant and its composing companies were all employed for the same purpose. That the object of the defendant and the composing companies was to drive out your petitioner as a competitor for its local, interstate, and foreign business, and the American Tobacco Company, and the Consolidated Tobacco Company, the Continental Tobacco Company, and the old American Tobacco Company, or one or two of them, furnished the expenses for this purpose and contributed at least a part of the expenses for this purpose, and paid subsidies on the output of the Craft Tobacco Company, Limited, all of which will more fully and at large appear by reference to letters and extracts from letters from Augustus Craft to P. S. Hill, in his capacity as agent as aforesaid, dated August 21, 1903, September 5 and September 23, 1903, and October 6, 1903, to be hereafter annexed to this petition for greater certainty.

"Your petitioner shows that, through all of said acts of the said American Tobacco Company and its composing companies, your petitioner's net profits were reduced in the sum of \$78,833, and your petitioner has been damaged and injured through the said unlawful, illegal, and malicious acts of defendants in said sum, and that under the act of Congress of July 2, 1890, known as the 'Sherman Act,' your petitioner is entitled to recover threefold damages and the costs of suit, including a reasonable attorney's fee.

"Your petitioner further shows that all of the illegal acts aforesaid of the American Tobacco Company and the composing companies were unknown to your petitioner, and all of the acts of said Augustus

**Statement of the Case.**

Craft and the Craft Tobacco Company, Limited, were unknown to your petitioner, until the 10th day of December, 1907, or some days after said date, when said acts were brought to light in a suit of the United States against the American Tobacco Company and others, now pending in the Circuit Court of the United States for the [404] Southern District of New York, and that, until said exposure was made in said litigation, your petitioner was in ignorance of proof against said defendant and unable to protect its rights. Your petitioner shows that its sales fell off as aforesaid from the organization of the Craft Company, Limited, on the 14th day of May, 1903, up to the time that your petitioner began to use the coupons and to incur the extra heavy expense thereof, amounting as aforesaid to \$61,000, all of which expense for coupons will more fully appear by reference to an itemized statement annexed to this petition and marked 'Exhibit B.'

"Your petitioner shows that the American Tobacco Company is represented in the state of Louisiana and is found in said state, and that W. R. Irby is duly appointed the agent of said company.

"Wherefore your petitioner prays that the American Tobacco Company, the Craft Tobacco Company, Limited, and Augustus Craft be cited to answer this petition, and, after all due and legal proceedings had, that said American Tobacco Company, the Craft Tobacco Company, Limited, and Augustus Craft, be ordered, adjudged, and decreed to pay your petitioner the sum of \$234,999, being threefold the amount of damages incurred by your petitioner and suffered by him through the acts of defendant, and for a reasonable attorney's fee, and for costs and all general relief."

Exceptions having been sustained to this petition, the plaintiff filed the following supplemental and amended petition (the exhibits are omitted here):

"The supplemental and amended petition of the People's Tobacco Company, Limited, filed in this case with leave of court first had and obtained, respectfully represents:

"That your petitioner reiterates and reaffirms the allegations contained in its original petition, and further represents:

"That the American Tobacco Company and the Craft Tobacco Company, Limited, and Augustus Craft are indebted unto your petitioner in the sum of \$168,926.85 in solido, as damages, which damages, under the act of Congress known as the 'Sherman Act,' should be increased threefold.

"Your petitioner further shows that your petitioner, having enjoyed the large business set out in petitioner's original petition, in the independent trade in New Orleans, in the year 1903, had amassed and built up a trade that netted your petitioner, in its business year from June 15, 1902, until June 15, 1903, the sum of \$40,282.43.

"That in the succeeding fiscal year ending June 1, 1904, through the illegal acts of defendants, your petitioner lost the sum of

## Statement of the Case.

\$19,719.43. That of this sum \$10,495 was caused by the increase in the price of tobacco by the defendants in the following manner, to wit:

"That the said American Tobacco Company (and the old American Tobacco Company and Consolidated Tobacco Company before the formation of the American Tobacco Company) were practically under the same control and management and conspiring together against all independent companies, and particularly your petitioner.

"That said last-named companies, in 1903, and thereafter, secretly controlled individuals, firms, and corporations, carrying on their conspiracy against interstate and foreign commerce under the names of such individuals, firms, and corporations. That among such firms controlled by said Consolidated, Continental, and old American Tobacco Companies, and afterwards, in October, 1904, by the American Tobacco Company, was the Nall & Williams Company of Louisville, and E. J. O'Brien & Company, also of Louisville, Ky.

"That your petitioner purchased most of its tobacco in Louisville through the Louisville Tobacco Warehouse Companies, and also purchased some tobacco in Cincinnati through the Cincinnati Tobacco Warehouse Companies. That said purchases were commonly and usually made by the independent companies in the tobacco business at auction, or on the 'breaks,' as it is commonly called.

"Now your petitioner shows that at said sales your petitioner's brokers were made to pay high prices for its tobacco by defendants, after the formation of the Craft Tobacco Company, Limited, to carry out the object of destroying your petitioner's business, and every facility was given the Craft Tobacco Company, Limited, to buy at a lower rate and to sell at a lower rate than petitioner by means of discounts, rebates, and larger packages.

[405] "That on May 6, 1903, in furtherance of said schemes, Craft wrote to C. C. Dula, in his capacity set forth in the original petition, that he had stopped in Louisville and secured the Nall & Williams account. That on November 7, 1904, Percival S. Hill, in his capacity set forth in the original petition, wrote Craft showing him how to secure tobacco, and that, for the purpose of deceiving petitioner, said Craft was instructed to buy from independent brokers, and on or about June 16, 1903, did buy from J. B. Spurgin & Co., who were acting as brokers for your petitioner.

"And by such means the old American Tobacco Company, the Continental Tobacco Company, and the Consolidated Tobacco Company, and the American Tobacco Company, or one or two of them, damaged your petitioner by bidding high prices on tobacco and causing your petitioner to buy at an increased rate.

"That in petitioner's fiscal year ending June 1, 1905, your petitioner lost the sum of \$26,347.92. That of these losses \$10,654.55 were due to the increased prices from the same causes.

## Statement of the Case.

"That in the fiscal year ending June 1, 1906, your petitioner lost the sum of \$32,265.24, and of this sum \$12,778.58 was due to the increased prices caused your petitioner by the defendants in the same manner.

"That in the fiscal year ending June 1, 1907, your petitioner lost the sum of \$14,514.85 through the same causes, making a total of \$62,957.85, through increased prices forced upon your petitioner by defendants.

"Petitioner further shows that it lost in profits of its trade—

|  |              |
|--|--------------|
| In the year ending June 1, 1904, the sum of..... | \$9, 224. 43 |
| In the year ending June 1, 1905, the sum of..... | 15, 683. 35  |
| In the year ending June 1, 1905, the sum of..... | 19, 486. 66  |
| Making a total loss of the sum of.....           | 44, 394. 44  |

—caused your petitioner by the organization of the Craft Company, Limited, as stated in your petitioner's original petition, by the taking away of your petitioner's trade through rebates in the form of return covers, selling larger packages of tobacco, and unfairly soliciting your petitioner's trade, all of which will more fully appear by reference to an itemized statement of all of your petitioner's expenses, annexed to this supplemental and amended petition, and all of your petitioner's productions, including tobacco, snuff, and cigarettes, from January 1, 1900, to June 15, 1900; from June 15, 1900, to July 1, 1901; from July 1, 1901, to June 15, 1902; from June 15, 1902, to June 1, 1903; from June 1, 1903, to June 1, 1904; from June 1, 1904, to June 1, 1905; from June 1, 1905, to June 1, 1906; from June 1, 1906, to June 1, 1907—annexed to and made part of this petition for greater certainty, marked 'Exhibit E.'

"Your petitioner further shows that the damages caused to your petitioner, by interference with your petitioner's workmen, amount to the sum of \$500.

"Your petitioner further shows that in June, 1905, your petitioner was forced, by the Craft Tobacco Company, who began underselling your petitioner by putting in coupons, to put in coupons in the cigarette pack worth one-half cent each, and coupons in tobacco packages worth one-quarter cent each, redeemable in cash by any one presenting same.

"That your petitioner was doing a large and extensive trade without these coupons, until the Craft Tobacco Company, Limited, began to take away from petitioner's business as aforesaid, and was forced, in June, 1905, and afterwards, to spend the sum of \$61,074.60, all of which will more fully and at large appear by reference to an itemized statement annexed to petitioner's original petition, marked 'Exhibit B.'

"That your petitioner is entitled to recover from defendants the said sum of \$61,074.60.

"Now your petitioner shows: That your petitioner was organized, as stated in its original petition, for the purpose of carrying on a

Statement of the Case.

general cigar, cigarette, and tobacco business, including manufacturing, buying, selling, and exporting tobacco to foreign countries and throughout the different states of the United States, and since its organization has carried on an extensive interstate and foreign business, selling its products in New York, Ohio, Illinois, Texas, New Mexico, and in the Republic of Mexico, and many other places.

"That the defendants have been engaged in interstate commerce and in commerce with foreign countries. That all the losses of your petitioner herein [406] above set forth have been caused by and were the result of conspiracy between the said American Tobacco Company and the component companies above named, Augustus Craft, and the Craft Tobacco Company, Limited, for the purpose of injuring your petitioner in his said business, and in violation of the laws of the United States, and particularly of the act of Congress approved July 2, 1890, and known as the 'Sherman Act.'

"Wherefore your petitioner prays that the defendants, the American Tobacco Company and the Craft Tobacco Company, Limited, and Augustus Craft, be cited to appear and answer this petition (er), and after all due and legal proceedings had, there be judgment in favor of your petitioner, and against the defendants, in the full sum of \$168,926.85, and that the said sum should be trebled in accordance with the said act of Congress, and the said treble damages should be allowed your petitioner as against the said defendants, and each of them; and petitioner prays for reasonable attorney's fees, and for costs, and for such further and general relief as the court may deem just and equitable."

The defendants excepted to the supplemental and amended petition on the following ground:

"That said petition fails to disclose a cause or right of action."

The court sustained the exception, "and decreed that the said exceptions be maintained, and that the plaintiff's suit be, and the same is hereby, dismissed at its costs."

The plaintiff brought the case to this court by writ of error. The judgment sustaining the exception and dismissing the petition (with 20 specifications) is assigned as error.

*Edwin T. Merrick and Ralph J. Schwarz*, for plaintiff in error.

*George Denegre, Joseph Paxton Blair, and Victor Leovy (Junius Parker, of counsel)*, for defendant in error American Tobacco Co.

*William S. Parkerson and Bernard Bruenn*, for defendants in error Craft Tobacco Co. and Augustus Craft.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

## Opinion of the Court.

SHELBY, Circuit Judge (after stating the facts as above):

This is an action for threefold damages under section 7, Act July 2, 1890 (chapter 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]). An exception of no cause of action was sustained by the court below. The sole question therefore is whether, on the facts alleged in the petition and admitted by the exception, this action can be maintained. The question can only be decided by an examination of the relevant parts of the act (which we copy in the margin<sup>a</sup>) in connection with the averments of the petition.

[407] The first and second sections of the statute describe and condemn certain acts which restrain interstate or for-

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<sup>a</sup>An act to protect trade and commerce against unlawful restraints and monopolies.

SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

SEC. 8. That the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country.



## Opinion of the Court.

eign commerce, and the seventh section provides that one who is injured in his business or property by another by reason of anything forbidden by the statute may sue for threefold damages. To repeat, the first and second sections condemn certain acts, and punish them as misdemeanors. The seventh section is to the effect that those who do the forbidden things, commit the misdemeanors, may be sued in a civil action for threefold damages by one who is injured in his business or property. It follows therefore that the petition should charge, and that is all that is required: (1) That the defendants have done one or more of the forbidden things; (2) that by such action of the defendants, the plaintiff has been injured in its business or property; and (3) the amount or value of such injury. If the petition contains these essential averments, it is not subject to an exception of no cause of action, although it may contain surplusage and may specify some items of damages which may not be recoverable.

But, before we examine the petition, we must look closer at the statute on which it is framed. Here is the description it gives of the condemned misdemeanors:

"SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor. \* \* \*

"SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor. \* \* \*

Presently we must examine the petition to see whether it charges that the defendants did one or more of these forbidden things. If it does so charge, it will remain to be determined whether there are averments showing that the plaintiff comes within the seventh section, to wit:

"SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor, \* \* \* and shall recover threefold the damages by him sustained. \* \* \*

## Opinion of the Court.

This more elaborate statement of the statute makes it plain that the petition need only aver, and state facts to show, that the defendants have committed one or more of the offenses condemned by the first and second sections, that the plaintiff is a person injured within the meaning of the seventh section, and the amount of damages it sustained by such injury. *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, was an action like this, brought under section 7 of the act. A demurrer was sustained to the declaration by the lower court, and in reversing the judgment Mr. Chief Justice Fuller, speaking for the court, had occasion to summarize the averments in holding them sufficient:

"We have given the declaration in full in the margin, and it appears therefrom: That it is charged that defendants formed a combination to directly restrain plaintiff's trade; that the trade to be restrained was interstate; that certain means to attain such restraint were contrived to be used and employed to that end; that those means were so used and employed by defendants; and that thereby they injured plaintiff's property and business."

We turn now to the petition to see if it has the necessary allegations to sustain the action, looking at it with the statute before us, aided by the summary of the declaration held to be good by the Supreme Court in *Loewe v. Lawlor*, *supra*.

We find an elaborate charge of a combination and conspiracy in restraint of interstate trade or commerce by the three defendants. Other persons, who are not sued, are named as parties to the conspiracy. Such other persons are corporations owned in part and controlled by one or more of the alleged conspirators who are sued. At great length, and with minute details, the petition alleges and describes this combination or conspiracy in restraint of interstate trade or commerce, showing that it is such as is condemned by the first section of the act. With equal fullness, there are allegations of an attempt by the defendants, with other conspirators, to monopolize the trade or commerce in tobacco among the several states, such an attempt and conspiracy as is condemned by the second section of the act. It is then alleged that the plaintiff was engaged in interstate trade or business, such as that engaged in by the defendant companies, and that the

## Syllabus.

described acts of the defendants were done for the purpose of obtaining a monopoly and destroying the business of the plaintiff. It is further alleged that by such conspiracies and combinations of the defendants, and by their efforts to obtain a monopoly, the business of the plaintiff was injured greatly, and that the plaintiff was damaged to the extent of \$168,926.85. The full petition is given in the statement of the case. It would serve no useful purpose now to condense and restate the facts alleged. If the averments are true—and the exception of no cause of action admits them to be true—the defendants are guilty of the misdemeanors charged in the first and second sections of the act, and the plaintiff has been injured in its business or property within the meaning of the seventh section.

We are of opinion therefore that the court erred in sustaining the exception of no cause of action.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

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[455] UNITED STATES *v.* AMERICAN NAVAL  
STORES CO. ET AL.\*

(Circuit Court, S. D. Georgia, E. D. May 12, 1909.)

[172 Fed. Rep., 455.]

**CRIMINAL LAW (§ 552)—TRIAL—CIRCUMSTANTIAL EVIDENCE.**—To warrant a conviction on circumstantial evidence, the proven facts must not only be consistent with the hypothesis of guilt, but must clearly and satisfactorily exclude every other reasonable hypothesis, except that of guilt.<sup>b</sup>

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1257, 1259-1262; Dec. Dig. § 552.]

**MONOPOLIES (§ 29)—CONSPIRACY IN RESTRAINT OF INTERSTATE COMMERCE—CRIMINAL PROSECUTION.**—Where an indictment against a number of defendants charges them with a conspiracy among them-

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\* For opinion of court overruling demurrer to indictment (186 Fed. Rep., 592), see Vol. 4, p. 48.

<sup>b</sup> Syllabus copyrighted, 1909, by West Publishing Co.

## Charge to the Jury.

selves and with others in restraint of interstate trade and commerce, in violation of section 1 of the anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), or to monopolize any part of such trade and commerce, in violation of section 2, to warrant a conviction, it must be found that at least two of the defendants were parties to such a conspiracy.

[Ed. Note.—For other cases, see *Monopolies*, Dec. Dig. § 29.]

**MONOPOLIES (§ 12)—FEDERAL ANTI-TRUST ACT—COMBINATIONS PROHIBITED—"MONOPOLY."**—The size of a business alone does not constitute a "monopoly" in restraint of interstate commerce, in violation of section 2 of the anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]); but to render a combination illegal thereunder it must intentionally and necessarily prevent other persons from engaging in such business, thereby stifling competition.

[Ed. Note.—For other cases, see *Monopolies*, Dec. Dig. § 12.

For other definitions, see *Words and Phrases*, vol. 5, pp. 4570-4574.]

**MONOPOLIES (§ 31)—FEDERAL ANTI-TRUST ACT—CONSPIRACY IN RESTRAINT OF INTERSTATE COMMERCE—CRIMINAL PROSECUTION.**—The elements of a combination or conspiracy in restraint of interstate trade and commerce and to monopolize such trade and commerce, in violation of the anti-trust act (Act July 2, 1890, c. 647, §§ 1 and 2, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), and the facts necessary to a conviction thereunder, explained in a charge to the jury.

[Ed. Note.—For other cases, see *Monopolies*, Dec. Dig. § 31.]

*Alexander Akerman*, Asst. U. S. Atty., and *W. M. Toomer*, Acting Asst. Atty. Gen., for the United States.

*P. W. Meldrim*, *Adams* and *Adams*, and *Powell* and *Makall*, for defendants.

**SHEPPARD**, District Judge (charging jury).

This case has been long, and necessarily taxing to your patience; but your attention throughout has been marked, demonstrating to the court your interest and deep appreciation of the importance of the issue, both to the government and to the defendants. The issues now rest solely upon an honest and impartial discharge of your duties under the guidance of the law, which it now becomes my duty, as best I may, to give you in charge. In our system of the administration of justice, the judge decides the questions of

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law, and directs you only as to the law of the case, while it is your peculiar province to pass on the [456] facts of the case, and by your verdict you decide the questions of fact involved in this controversy. I shall be as brief as the case admits, and will confine my instructions mainly to what I conceive to be the law applicable to the facts adduced.

The issue which it is your province under our system of government to determine is the innocence or guilt of the accused upon the indictment, which was read to you at the opening of this case. By order of the court, the third count of the indictment was stricken, and you have therefore before you only the first and second counts.

The defendants indicted are the American Naval Stores Company, a corporation of West Virginia, the National Transportation & Terminal Company, a corporation of New Jersey, Edmond S. Nash, Spencer P. Shotter, J. F. Cooper Myers, George Meade Boardman, Carl Moller, and C. J. De Loach. As to the defendant C. J. De Loach you are directed to find a verdict of "not guilty."

The two counts of the indictment and the government's bill of particulars will be before you, and you should examine them very carefully, in connection with all the evidence in the case and the principles of law I will presently give you, in reaching your conclusions. To the two counts of the indictment all the defendants have pleaded "not guilty." It is necessary that I should present for your consideration certain rules of evidence, which should be borne in mind throughout your deliberations. The plea of the defendants raises immediately the presumption of innocence, and this presumption accompanies them throughout the trial, and until it is overcome by testimony which satisfies your minds beyond a reasonable doubt of the truth of the charge.

The burden of proof is therefore on the government to prove the conspiracy charged in the indictment beyond a reasonable doubt. While this is true, if the weight of evidence does satisfy your minds beyond such a reasonable doubt, the presumption of innocence is removed, and if you should be thus satisfied with regard to any two or more of the defendants it would be your duty with regard to them to find a verdict of "guilty."

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Again, if with regard to any one or more of the defendants the evidence should fail to satisfy your minds beyond such reasonable doubt of their guilt, it would be your duty to acquit them. It is important, then, that you should understand what is a reasonable doubt. It is not a mere possible doubt, because in human affairs, which depend upon deductions, there may be possible or imaginary doubts. A reasonable doubt is that state of the case which, after the entire comparison and consideration of all the evidence, leaves your minds in such a condition that you cannot say that you feel an abiding conviction, to a moral certainty, of the truth of the charge. By reasonable doubt is not meant strained or whimsical conjecture, but an actual, sincere, mental hesitation, caused either by insufficient evidence or by unsatisfactory evidence? In other words, it has been defined as "such a doubt as a reasonable man would have, and hesitate to act upon in matters of the highest concern for his own welfare." If you have such a doubt, you should give the defendants the benefit of it, and acquit them of whom you have such a doubt; but the government is not required to prove its case beyond all doubt.

[457] In this case the government relies on circumstantial evidence. Now, such evidence has been defined to be that which does not directly prove the issue, but which tends to establish the issue only by proof of the facts, sustaining by their consistency the hypothesis claimed, and from which the jury might infer the principal fact. It is composed of facts which raise logical inferences, and by a chain of such inferences lead to the ultimate conclusion, which is sought to be made. A conviction may as well be had upon circumstantial evidence as upon direct evidence; but to warrant a conviction upon evidence of this character the proven facts must not only be consistent with the hypothesis of guilt, but must do this so clearly and satisfactorily as to exclude every other reasonable hypothesis save that of guilt.

With these general rules of law before you, you should next consider, under the interpretation I shall give, the provisions of the statute approved July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), with the violation of which the defendants are charged by this indictment. It

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is entitled "An act to protect trade and commerce against unlawful restraints and monopolies." Section 1 provides as follows:

"Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be deemed guilty of a misdemeanor," etc.

Section 2 provides as follows:

"Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor," etc.

The first count of the indictment charges a violation under section 1, and the second count charges a violation under section 2. As the latter section is easier defined, it may be well to consider that section and count first. After setting out the relations of the several defendants to each other and their several parts, it is charged that:

"Having already secured to themselves more than half the trade and commerce among the several states of the United States and with foreign nations in the aforesaid articles of commerce, did then and there \* \* \* unlawfully combine, conspire, confederate, and agree together, amongst themselves and with divers other persons to the grand jurors aforesaid unknown, to further monopolize the trade and commerce, to be effected, amongst other ways, as follows."

The count then continues to set forth twelve different means by which the alleged monopoly was to be accomplished. These means will be discussed later in connection with the first count of the indictment. The effect of the second count charges a combination and conspiracy to monopolize interstate commerce in "spirits of turpentine, rosin, and the products of pine forests and turpentine farms, commonly called 'naval stores.'"

To constitute the offense of monopolizing or attempting to monopolize under the act of Congress, it is necessary to acquire, or attempt [458] to acquire, an exclusive right in such commerce by means which will prevent others from engaging

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therein. Various definitions of "monopoly" have been given:

"The abuse of free commerce, by which one or more individuals have procured the advantage of selling alone all of one particular kind of merchandise, to the detriment of the public; any combination among merchants to raise the price of any particular merchandise, to the detriment of the public."

The popular meaning of "monopoly" at the present day seems to be the sole power (or a power largely in excess of that possessed by others) of dealing in some particular commodity or at some particular market or place, or of carrying on some particular business. Anything less than this is not monopoly. The results in business or trading combinations may even temporarily, or perhaps permanently, reduce the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reductions in the price of a commodity dealt in might be dearly paid for by the ruin of such a class and the absorption of control over one commodity by an all-powerful combination of capital, whose purpose in combining is to control the product or manufacture of any article on the market, and by such control dictate the price at which the article shall be sold; the effect being to drive out of business all the small dealers in the commodity and to render the public subject to the decision of the combination as to what price shall be paid for the article.

This will illustrate the fundamental idea to be borne in mind in determining if there was in this case a conspiracy to monopolize—that the essence of the monopoly "is found not so much in the creating of a very extensive business in the hands of a single control." The size of a business is not in itself a violation of this law, and should carry with it no great weight in considering the second count of the indictment. The criminal act in the statute is the certain and necessary prevention of all other persons from engaging in



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such business, and thereby stifling competition. The evil is not the enlargement of the trade of one person or corporation, but the destruction of the trade of all other persons in the same commodity.

It is sometimes difficult to distinguish between a legitimate business enterprise and an illegal monopoly. From the law as has been interpreted, it may be said, however, that the monopoly is the power acquired over the traffic, sale, and purchase of a commodity, in the course of interstate or foreign commerce, by which the free flow of such commerce and competition in such commodity is necessarily crushed and stifled. Since the size of the business alone is not necessarily illegal, it is the crushing of competition, by means of force, threats, intimidation, fraud, or artful and deceitful means and practices, which violates the law. You will consider carefully all the means which the indictment charges, and inquire (1) whether the defendants, or any two or [459] more of them, did in fact unlawfully combine, conspire, confederate, and agree together to "monopolize," by acquiring such power over the disposition of rosins, turpentine, and naval stores, which were the subject of interstate and foreign commerce, so that they were capable of forming, and did form, a scheme to crush and stifle competition; and (2) if such scheme of gaining and controlling business was to be effected by illegal methods of force, threats, intimidation, fraud, or artful or deceitful means and practices, which their competitors in such trade were necessarily unable to meet. The size of business, and the gaining of business popularity, fair dealing, sagacity, foresight, and honest business methods, even if it should result in acquiring the business of competitors, would not make an illegal monopoly. It is the acquisition and use of unfair and illegal power in defeating competition which makes such illegal monopoly.

Having, therefore, considered the question of monopoly under the second count of the indictment, you must next consider the element of conspiracy. Before you would be authorized to convict on the second count of the indictment, you must find the existence of such conspiracy, in connection with the charge of monopolizing; and before you would be

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authorized to convict on the first count you must find such conspiracy in connection with the charge of restraining trade and commerce among the several states of the United States and with foreign nations. It will become necessary and essential, therefore, for you to determine three conclusions in consideration of the second count of the indictment: (1) The fact of monopolizing; (2) the fact of conspiracy; and (3) the fact that such monopolizing and such conspiracy affected interstate or foreign commerce.

In order to constitute a violation of this statute, which prohibits combinations and conspiracies to "monopolize," the monopoly must affect and operate directly upon commerce among the states of the United States or with foreign nations. It is not sufficient that it affects only the commerce within a single state. It must be interstate or foreign commerce. Such commerce includes the purchase and sale of articles that are intended to be transported from one state to another—every species of commercial intercourse among the states and with foreign nations. The term comprehends now intercourse for the purposes of trade in any and all of its forms, including transportation, purchase, sale, and exchange of commodities between the citizens residing and domiciled in the different states.

By these tests you will determine whether the transactions which are charged in the indictment directly operated upon and necessarily affected commodities used in interstate and foreign commerce as I have defined them. If you find that spirits of turpentine, rosin, and the products of pine forests and turpentine farms, commonly called "naval stores," were the subjects of intercourse or traffic, I have stated, throughout the transactions charged, it would be your duty to find that they in fact were the subjects of trade or commerce among the several states or with foreign nations, within the meaning of both the first and second sections of the act you are to consider. As I have stated, you are to consider the two counts of the indictment separately. [460] The second relates to a conspiracy to monopolize, and the first relates to a conspiracy to restrain interstate commerce. What I have already said has related to the second count of the indict-

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ment, viz., the charge that the defendants conspired to monopolize interstate and foreign commerce, and in that connection I have defined what is meant by the word "monopolizing" and the words "trade and commerce among the several states and with foreign nations."

In both counts of the indictment the essential ingredient of the offenses is the fact of conspiracy. A conspiracy is defined as:

"A combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means."

The conspiracy to which the statute refers here may also be defined as the agreement, confederation, combination, design, scheme, plan, or purpose of two or more parties to accomplish by their concerted action or co-operation an unlawful result by either lawful or unlawful means, or a lawful result by unlawful means. Here it is the unlawful or criminal results which are made punishable, and those results are the monopolizing of trade and commerce among the several states and with foreign nations, and in the first count of the indictment the restraint of trade and commerce among the several states and with foreign nations. The law condemns these two results, and when two or more persons conspire to produce either of these results there is a violation of the statute.

The gist of the offense is the unlawful agreement. A conspiracy cannot be committed by one person alone. There must be two wills acting in co-operation. Since both counts of the indictment charge that certain of the defendants conspired among themselves, I charge you that on either count you must find that at least two of the defendants conspired to commit the acts charged, although divers other persons to the grand jurors aforesaid unknown may or may not have been concerned. On either count a verdict of guilty could not be found against a single defendant. The gist of the conspiracy is that two or more shall form a plan for concerted action. You must, under the rules I have stated and will state, find at least two to be guilty under one or the other count before you would be authorized to convict under either

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count. The concerted action or co-operation may arise from definite, express, and well-understood agreement or combination, or it may arise as well from a tacit silent understanding.

It has been said that to establish a conspiracy it is not necessary that there should be an explicit or formal agreement for an unlawful act between parties, nor is it essential that direct and positive proof be made of an express agreement to do the act forbidden by law. In conspiracy cases, it may be often impossible to produce such proof, because conspiracies are not usually meditated and planned in the presence of witnesses not parties thereto, nor in terms of express language. Hence a conspiracy may be proven by circumstances. The understanding, combination, or agreement between the parties in a given case to effect the unlawful purpose charges must be proved beyond a reasonable doubt, because without corrupt understanding there [461] is no conspiracy; but circumstantial evidence may be resorted to to show such agreement or conspiracy.

Conspiracies may be entered into in a very informal way; generally, in fact, in an informal way. The parties may not come together at all. They may be in different parts of the country. But if, by any means, by telegraph, or letter, or by any means whatever, they have come to a mutual understanding for committing any offense against the government, that is a conspiracy. The rule in regard to conspiracy, as in regard to all offenses, is that you shall be satisfied in your own mind, beyond a reasonable doubt, of the guilt of the defendants, or any two of them. There must be criminal intent on the part of those who form a conspiracy; but, to constitute a criminal intent, it may not be necessary to show an intent to violate the law. The question is: Did the accused enter into a conspiracy to do the things with which they are charged, and were such things violations of the statute?

You have now before you the tests by which you are to determine the three elements of the offense charged in the second count of the indictment, viz., conspiracy to monopolize interstate and foreign trade and commerce: (1) Was there a monopoly? (2) Did it necessarily embrace a commodity of

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interstate or foreign commerce? and, (8) as I have defined, was there a conspiracy to monopolize?

What has been said on the subject of what is interstate and foreign trade and commerce and what is conspiracy relates as well to the first count of the indictment as to the second.

The first count charges that the defendants, the American Naval Stores Company, National Transportation & Terminal Company, Edmond S. Nash, Spencer P. Shotter, J. F. C. Myers, George Meade Boardman, C. J. De Loach and Carl Moller, "unlawfully and knowingly amongst themselves combined, conspired, confederated, and agreed together to restrain trade and commerce among the several states and with foreign nations." The count sets forth twelve different means or instruments by which the alleged conspiracy in restraint of trade was to be carried into effect. As to three of these means stated there has been no testimony. Evidence of certain alleged means has been submitted to your consideration for two purposes: (1) As circumstantial evidence that the defendants formed a conspiracy; and (2) that such means naturally and necessarily tended to and did cause a restraint of interstate and foreign trade and commerce. It is the contention of the government that they were parts and elements of a scheme or design on the part of the defendants to restrain trade; and you may consider all of the means on which evidence has been submitted as circumstances merely, from which you may or may not conclude that there was such an understanding—that is, a co-operation and design—on the part of two or more of the defendants as would, under all the rules I have given you, be sufficient to constitute a conspiracy between them; and this, as I have said, must be shown beyond a reasonable doubt.

With this issue in view you may consider the evidence of the means which it is insisted by the prosecution tends to show a conspiracy. No evidence as to three of the means has been offered, and you should [462] not consider them. These are the charges of circulating and publishing false statements, the charge of issuing and causing to be issued, and causing to be circulated and hypothecated, fraudulent warehouse receipts, and the charge of attempting to bribe em-

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ployees of competitors and factors to obtain certain information.

One of the means charged is the coercing of factors and brokers into entering into certain contracts, which you will recall. It will be well for you to understand the legal meaning of "coercing." The word "coerce" means to restrain by force, especially by law or authority; to repress. In the sense which now prevails, it differs but little from the word "compel," yet there is a distinction between them; "coercion" being usually accomplished by indirect means, as threats or intimidation, physical force being more rarely used in coercing. It imports some actual or threatened exercise of power possessed or supposed to exist or be possessed by the party who, it is claimed, so acted.

As to what constitutes a restraint of trade under the statute, the act prohibits any combination which obstructs the free flow of commerce between the states, or restricts, in that regard, the liberty of a trader engaged in business. This includes restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of interstate trade or commerce, except on conditions that the combination imposes. But as to the coercion which is charged in the indictment, in coercing factors to enter into contracts, such means alone, if you find that any coercion was exercised, would not be sufficient to make a restraint of commerce, unless you find that the parties stated made the contracts with the defendants, because the defendants actually possessed such power over the products to be traded in that the parties honestly and truly felt and believed that if they did not make the contract they would suffer some serious and appreciable financial loss.

The burden of proof is upon the government to show beyond a reasonable doubt that, if the defendants conspired, the means which they were to employ, and the natural and inevitable result of those means, would necessarily tend to burden and restrain interstate and foreign commerce. The gist of the offense under the first section is the conspiracy to effect a restraint and burden upon such commerce. The alleged conspiracy need not result in a total suppression of trade, nor in a complete monopoly; but it is sufficient if the



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necessary operation of certain means tends to restrain interstate commerce and to deprive the public of the advantages flowing from free commerce and competition.

It is not necessary for the government to prove that all of the means charged were in fact a part of a single purpose and conspiracy by two or more of the defendants, or that all of the means charged were in fact carried out by two or more of the defendants. It is sufficient if it be reasonably shown beyond a reasonable doubt that some of those means charged were a part of the common scheme or design or understanding by two or more of the defendants, and that those same means were of themselves sufficient to cause an essential obstruction of the free and untrammelled flow of trade and commerce between the states and with foreign nations. Both of these ingredients, I charge you, it is necessary for the government to show beyond a reasonable doubt [468] before you would be authorized to convict two or more of the defendants: (1) The common design, scheme, or understanding; and (2) the restraint or burden upon free flow of commerce between the states and with foreign nations. Before these inferences may be made from the operation of any one or more of the means charged, the fact that these means were employed, and the fact that they were employed as the purpose of the conspiracy of two or more of the defendants, must be proved beyond a reasonable doubt.

However, it is true that, even if the separate elements of a scheme are unlawful, when they are bound together by a common intent as parts of an unlawful scheme to monopolize or to restrain interstate and foreign trade or commerce, the plan itself may make the parts unlawful. It is the illegal results, viz., the monopoly or the restraint of commerce, which makes a conspiracy criminal within the purview of the Anti-Trust Act. If there was a conspiracy, and that tended necessarily to impose the restraints prohibited, the constituent elements, whether legal or not, are enough to give the scheme a body. A series of acts, each or any of which may be innocent in itself, may be wrongful, if the direct object, purpose, or result thereof be to carry into effect a previous agreement, or conspiracy, whereby the free flow of trade or commerce between the states and with foreign

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nations, or the liberty of the trader to carry on such business, be obstructed.

I charge you, further, that the prohibitory provisions of the act under consideration apply to all monopolies, combinations, or conspiracies in restraint of interstate or foreign trade or commerce, without exception or limitation, and are not confined to those in which the restraint is unreasonable. The government need not show that a conspiracy is entered into for the direct purpose of restraining trade or commerce, if such restraint is its necessary effect, and if this, with the other elements stated, be shown beyond a reasonable doubt. All the means and all the illegal acts which the indictment charges must have been done within three years prior to the finding of the indictment. Any acts beyond this period you should not consider.

If you should find under these principles laid down that any of the alleged means were employed, and the necessary effect of those means was to restrain interstate and foreign commerce, in considering whether those means or acts were a part of the purpose of the several defendants toward those means and acts and towards each other, if you should find beyond a reasonable doubt that certain acts were done or means employed, you may inquire who were responsible for those acts, and whether any two or more of the defendants were responsible, and whether such acts were the result of a preconceived plan for concert of action on the part of any two or more of the defendants.

A corporation, although an artificial being, existing only in contemplation of law, is held to the same measure of liability as an individual, and is entitled to the same rights of protection as an individual. A corporation acts through its officers, directors, and agents. While a corporation may not conspire with its own officers, directors, or agents, it may conspire with another corporation. Corporations may conspire with individuals. As well as individuals may conspire with one another, they may conspire with another corporation. But you [464] must bear always in mind that a corporation is only responsible for the acts of its agents while acting within the scope of their employment, or for such acts only as may have been authorized.

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You may consider all the evidence of the relationship, if any, of the defendants toward each other, and their connection, if any, with any of the acts charged. You may consider the acts and declarations of persons not named in the indictment, if you find that they were done and said in the presence of any one of the defendants, and if they were made in carrying a conspiracy or common scheme into effect. The indictment charges that the defendants conspired with divers other persons to the grand jurors unknown. If you find that any two or more of the defendants conspired with any person not named in the indictment to commit the offenses charged, you would be authorized under the rules laid down to find any two or more of the defendants guilty under either or both counts. If, on the other hand, any of the elements of the offenses are lacking, and no two or more of the defendants did so conspire, it would be your duty to acquit them.

A private corporation or an individual is liable for the wrongful acts of its agents, when those agents are acting in the general line of their duties, or if such corporation ratifies those acts in some active way, other than merely passive acquiescence.

Evidence has been introduced to the effect that two other corporations, which were distinct from the defendant companies, existed in the state of New York at the time of the alleged acts. The defendant companies are the American Naval Stores Company of West Virginia and the National Transportation & Terminal Company, alleged to be organized under the laws of New Jersey. The New York corporations were known as the American Naval Stores Company of New York, and the National Transportation & Terminal Company of New York. Evidence has been introduced as to certain transactions or acts occurring at the yards in Brooklyn, N. Y. The witness O'Keefe testified that he was employed by the American Naval Stores Company, and other witnesses testified that they worked at the yards in question. Their witness Dill testified that he was the president of the National Transportation & Terminal Company of New York, that he employed O'Keefe for the National Transportation

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& Terminal Company of New York, and that the yards belonged to the National Transportation & Terminal Company of New York. You have heard the evidence as to the ownership of the rosin which entered the yards.

If you find that the acts alleged were by certain employees of New York corporations, and that these corporations were separate and distinct from the two defendant corporations, and that such New York corporations did not conspire, as charged, with two or more of the defendants, then you should not consider any of the acts which are charged to have occurred on the properties of these New York corporations, or the acts of employees or agents thereof. But if, on the other hand, the evidence satisfies you beyond a reasonable doubt that one or both of the New York corporations was in fact so owned, controlled, dominated, and operated by one or both of the defendant corporations, that had the same officers, and it was in fact, in its business [465] transactions, for all practical purposes identical with one or both of the defendant corporations, the New York corporation which you find so connected you may consider in connection with the defendants. If you further find that two or more of the defendants conspired as charged with one or both of the New York corporations to monopolize or restrain interstate commerce, you would be authorized to find a conviction as to such defendants; or if you find that the employees or agents of such New York corporations were in fact, as I have stated, employees or agents of one or both of the defendant corporations, such corporations, if you find them so identical, would be responsible for the acts of such employee or employees, if they authorized them, or if they clearly ratified their wrongful acts subsequently. But you must consider this evidence in connection with all the other evidence in the case; that is, whether there was any conspiracy between any two of the defendants with either or both of the New York corporations or their agents, or whether said New York corporations, or their agents or employees, were dominated, directed, or controlled by any two or more of the defendants, and that such acts or means alleged to have been committed at the Brooklyn yards were authorized or ratified by any two of the defendants.

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You are the sole and exclusive judges of all questions of fact. When there is a conflict in the testimony, it is your province to reconcile that conflict, if you can; but, if you are unable to reconcile it, then you are at liberty to discard such parts or so much of it as you may think unworthy of belief, and credit that which you believe to comport more with reason and common sense and your own experience in the common affairs of everyday life. You have had an opportunity of seeing the witnesses and observing their manner of testifying on the stand, as well as any interest or bias they may have shown in the transactions about which they have testified. These are matters for your consideration in weighing the evidence, and which may aid you in arriving at a fair, just, and impartial conclusion from all the testimony. It is your province to look to the interest which any witness may have in the result of the trial, in determining the weight to be attached to his testimony.

In your deliberations, you will not lose sight of the main fact that the specific offenses with which the defendants are charged are (1) a conspiracy to restrain interstate trade, and (2) a conspiracy to monopolize interstate trade. All that is charged as the means to effect such conspiracy may be proved as alleged, yet if you are not satisfied that such things tended to restrain interstate trade or commerce, or tended to the monopoly of such trade or commerce, and, further, that such things done were the result of some previous tacit or express understanding between two or more of the defendants, they could not be convicted of the conspiracy charged. If, on the other hand, you believe from all the evidence that the things charged in the indictment as means adopted and effecting the restraint of trade were done by the defendants, and that said means naturally or necessarily tended to such restraint, and, further, that such means adopted were the result directly of a previous express or tacit understanding between two or [466] more of the defendants, such ones as you believe to have been so connected in such agreement or understanding you should find guilty. If you have a reasonable doubt of such an agreement or understanding, you should give them the benefit of the doubt and acquit them.

**Syllabus.**

You may find all the defendants guilty, or any two of them, on one or both of the counts of the indictment, or you may acquit them all.

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**[177] UNITED STATES v. STANDARD OIL CO. OF  
NEW JERSEY ET AL.\***

(Circuit Court, E. D. Missouri, E. D. November 20, 1909.)

[173 Fed. Rep., 177.]

**COMMERCE (§ 3)—ANTI-TRUST ACT—CONGRESSIONAL RESTRICTION OF USE OF CONTRACTS AND METHODS OF HOLDING TITLES TO RESTRAIN INTERSTATE COMMERCE AUTHORIZED BY CONSTITUTION.**—Congress has power, under the commercial clause of the Constitution, to regulate and restrict the use, in commerce among the several states and with foreign nations, of contracts, of the method of holding title to property, and of every other instrumentality employed in that commerce, so far as it may be necessary to do so in order to prevent the restraint thereof denounced by Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 8200).<sup>3</sup>

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 3; Dec. Dig. § 8.]

**MONOPOLIES (§ 12)—ANTI-TRUST ACT—TEST OF LEGALITY OF COMBINATION ITS NECESSARY EFFECT UPON COMPETITION.**—The test of the legality of a combination under this act is its necessary effect upon competition in commerce among the states or with foreign nations.

If its necessary effect is only incidentally or indirectly to restrict that competition, while its chief result is to foster the trade and increase the business of those who make and operate it, it does not violate that law.

But, if its necessary effect is to stifle or directly and substantially to restrict free competition in commerce among the states or with foreign nations, it is illegal within the meaning of that statute.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

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\* For opinion of Circuit Court on motion to quash service on non-resident defendants (152 Fed. 290), see *ante*, p. 173

For opinion of Supreme Court affirming judgment (221 U. S. 1); Vol. 4, p. 79.

<sup>3</sup> Syllabus copyrighted, 1909, by West Publishing Company.

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**MONOPOLIES (§ 12)—ANTI-TRUST ACT—POWER TO RESTRICT COMPETITION VESTED BY COMBINATION INDICATIVE OF ITS CHARACTER.**—The power to restrict competition in commerce among the several states or with foreign nations, vested in a person or an association of persons by a combination, is indicative of the character of the combination, because it is to the interest of the parties that such a power should be exercised, and the presumption is that it will be.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

**MONOPOLIES (§ 20)—ANTI-TRUST ACT—COMBINATION IN ONE PERSON OF POWER OF MANY TO RESTRICT COMPETITION RENDERS THAT POWER MORE EFFECTIVE AND DURABLE.**—The combination in a single corporation or person, by an exchange of stock, of the power of many stockholders holding the same proportions, respectively, of the majority of the stock of each of several corporations engaged in commerce in the same articles among the states or with foreign nations, to restrict competition therein, renders the power thus vested in the former greater, more easily exercised, more durable, and more effective than that previously held by the stockholders, and it is illegal.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 20.]

**MONOPOLIES (§ 20)—ANTI-TRUST ACT—COMBINATION RESTRICTING COMPETITION IN INTERSTATE COMMERCE BY EXCHANGE OF STOCK OF TRADING CORPORATIONS ILLEGAL—FACTS—CONCLUSION.**—In 1899 the stockholders of the Standard Oil Company of New Jersey owned a majority of the stock of 19 other corporations in the same proportions that they owned the stock of the Standard Company, and those 20 corporations controlled, by the ownership, of the majority of their [178] stock or otherwise, many other corporations. Each of these corporations was engaged in some part of the business of producing, buying, refining, transporting, and selling petroleum and its products, and they were conducting about 80 per cent. of the production of the crude oil and more than 75 per cent. of the business of purchasing, refining, transporting, and selling petroleum and its products in this country. Many of them were engaged in commerce in these articles among the several states and with foreign nations, and were naturally competitive.

During the 10 years prior to 1879 the 7 individual defendants had acquired control of many corporations, partnerships, and refineries that had been competing in this business, had placed the majority of the stock of those corporations and the interests in property and business thus obtained in various trustees, to be held and operated by them for the stockholders of the Standard Oil Company of Ohio, one of the 19 companies in which the individual defendants were principal stockholders, and had thereby suppressed competition among these corporations and partnerships. In 1879 they and

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their associates caused all the trustees to convey their interests in the stock, property, and business of all these corporations to 5 trustees, to be held, operated, and distributed by them for the stockholders of the Standard Company of Ohio. From 1879 until 1892 they prevented these corporations and others engaged in this business, of which they secured control, from competing in this commerce, by causing the control of their operations, and generally of a majority of their stocks, to be held in trust for the stockholders of the Standard Company of Ohio, and from 1892 until 1899 they accomplished the same result by a similar stockholding device and by the joint equitable ownership of the majority of the stocks of the corporations.

In the year 1899 the 7 individual defendants and their associates caused the majority of the stock of the 19 corporations to be transferred to the Standard Oil Company of New Jersey in exchange for its stock, so that the latter company thereby acquired the legal title to a majority of the stock of each of the 19 companies, the control of these companies and of all the companies which they controlled, and the power to fix the rates of transportation, and the purchase and selling prices of petroleum and its products, which all these corporations should pay and receive in the conduct of their business in commerce among the states and with foreign nations. Since that exchange of stock the 7 individual defendants have been and are stockholders and officers of the Standard Company of New Jersey, which has exercised, and is still using, that power, and by its use it has prevented, and is still preventing, competition in commerce among the states and with foreign nations among these corporations.

*Held*, the transaction constituted a combination and conspiracy in restraint of, and to monopolize, commerce among the states and with foreign nations, in violation of sections 1 and 2 of the anti-trust act of July 2, 1890 (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 8200]), and the government is entitled to an injunction against the farther continuance and operation thereof.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 20.]  
(Syllabus by the Court.)

In Equity. Bill by the United States against the Standard Oil Company of New Jersey and others. Decree for complainant.

See, also, 152 Fed. 290.

*Frank B. Kellogg* and *Charles B. Morrison* (*The Attorney General, Cordenio A. Severance, J. Harwood Graves, and Guy Chase*, on the brief), for the United States.



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*John G. Johnson, John G. Milburn, D. T. Watson, and Mortiz Rosenthal (M. F. Elliott, Martin Carey, Frank L. Crawford, Chauncey W. [179] Martyn, Douglas Campbell, Walter F. Taylor, John M. Freeman, Ernest C. Irwin, and W. I. Lewis, on the brief), for defendants.*

Before SANBORN, VAN DEVANTER, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge.

This is a suit brought by the United States to enjoin the Standard Oil Company of New Jersey, a corporation, about 70 subsidiary corporations, and 7 individual defendants, from continuing an alleged illegal combination in restraint of commerce among the several states, in the District of Columbia, in the territories, and with foreign nations, in violation of the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901 p. 3200]). The provisions of that act pertinent to the issues in this case are:

## Section 1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

## Section 2:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor."

## Section 8:

"The word 'person' or 'persons' wherever used in this act shall be deemed to include corporations and associations."

Repeated discussion and consideration of the purpose and meaning of this act have established, by controlling authority, beyond debate in this tribunal, these pertinent rules for its interpretation and application to the facts of this case. The test of the legality of a contract or combination under this act is its direct and necessary effect upon competition in interstate or international commerce. If the necessary effect

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of a contract, combination, or conspiracy is to stifle, or directly and substantially to restrict, free competition in commerce among the states or with foreign nations, it is a contract, combination, or conspiracy in restraint of that trade, and it violates this law. The parties to it are presumed to intend the inevitable result of their acts, and neither their actual intent nor the reasonableness of the restraint imposed may withdraw it from the denunciation of the statute. *Ad-dyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 234, 20 Sup. Ct. 96, 44 L. Ed. 136; *Northern Securities Company v. United States*, 193 U. S. 197, 331, 24 Sup. Ct. 436, 48 L. Ed. 679; *United States v. Joint Traffic Association*, 171 U. S. 505, 577, 19 Sup. Ct. 25, 43 L. Ed. 259; *Hopkins v. United States*, 171 U. S. 579, 592, 19 Sup. Ct. 40, 43 L. Ed. 290.

The exchange of the stock or shares in the ownership of competitive corporations engaged in interstate or international commerce for stock or shares in the ownership of a single corporation, the necessary effect of which is a direct and substantial restriction of competition in that commerce, constitutes a combination in restraint of commerce among the states or with foreign nations that is declared illegal by this [180] law. *Northern Securities Company v. United States*, 193 U. S. 197, 354, 366, 24 Sup. Ct. 436, 48 L. Ed. 679; *United States v. American Tobacco Co. (C. C.)* 164 Fed. 700, 718.

The business of the defendants is the production and the purchase of petroleum, its storage, its transportation from the producing wells to refineries, the refining of this oil, and the transportation and sale of its products to purchasers in this and other countries. In 1865 John D. Rockefeller owned a refinery in Cleveland, Ohio. He and Samuel Andrews formed the firm of Rockefeller & Andrews, which bought and operated this refinery. In 1870 the successors of this firm, John D. Rockefeller, William Rockefeller, Samuel Andrews, Henry M. Flagler, and Stephen D. Harkness, owned two refineries, and had a domestic trade in oil at Cleveland and a warehousing business and an export trade at the port of New York, which they vested in the Standard Oil Company of Ohio, a corporation with a capital stock of \$1,000,000,

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which they then organized. Between the organization of that corporation in 1870 and April 8, 1879, Henry H. Rogers, John D. Archbold, Oliver H. Payne, and Charles M. Pratt associated themselves with the Rockefellers and Flagler and became stockholders in this corporation, and these 7 defendants and their associates increased the number of its stockholders to 37, its capital stock to \$3,500,000, the value of its property to a much larger sum, and acquired for the stockholders of that corporation, by the purchase of property conveyed directly to it, by the exchange of its stock for stock of other corporations and for interests in partnerships, and by placing the title to the business and property obtained in new corporations organized to hold them, and then vesting the title to a majority of all of their stock in various individuals in trust for the stockholders of the Standard Oil Company, more than 40 competitive refineries located, respectively, in Cleveland, Pittsburg, Titusville, Parkersburg, Baltimore, Philadelphia, Bayonne, New York Harbor, Boston, and other places, and the ownership of the entire interest or of a controlling interest in more than 30 companies, some of which were corporations, while others were partnerships, engaged in the same general business. The result was that on April 8, 1879, the stockholders of the Standard Oil Company were, by their holdings of stock and by their position as cestui que trust, practically the owners of controlling interests in the property and the business of more than 30 companies engaged in the oil business, the title to which was held in trust for them by the Standard Oil Company and other trustees in proportion to their ownership of the stock of that corporation. Thereupon on that day the Standard Oil Company and all the other trustees conveyed their interests in the stock, property, and business of these concerns to George H. Vilas, M. R. Keith, and George F. Chester, in trust, to hold and manage them for, and to divide and distribute them among, the 37 stockholders of the Standard Oil Company in proportion to their respective holdings of the stock of that company. The trustees, however, did not divide or distribute, but operated the refineries and the companies which they held under this deed, and with their earn-

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ings purchased other property and the stock of other companies, until in 1882 they held in this trust property worth more than \$55,000,000.

[181] In January, 1882, the owners, as cestuis que trust and otherwise, of all this property, and the trustees, George H. Vilas, M. R. Keith, and George F. Chester, entered into a trust agreement to the effect that all the stocks they owned in the Standard Oil Company of Ohio and in all other corporations and limited partnerships engaged in the oil business, 39 of which were mentioned in the contract, were conveyed to 9 trustees during their lives and the life of the survivor of them and for 21 years thereafter, unless the trust was sooner dissolved by vote of the shareholders; that these trustees might organize other corporations to produce, manufacture, refine, and deal in petroleum and its products; that they might buy with the trust funds bonds or stocks of other companies engaged in similar or collateral business; that as stockholders of the various corporations they should elect the officers of those corporations; that they should issue and deliver, to each of the equitable owners of the stocks, bonds, and property held by them, trust certificates, which should show the value and extent of his interest in the trust in shares of the par value of \$100 each; and that they should supervise the business of all the companies whose stock they held, collect the dividends upon the stock and the interest upon the bonds in their possession, and distribute the income thus derived in dividends upon the trust certificates. Six of the individual defendants were six of the nine trustees, and these trustees issued for the stocks, the title to which was thus conveyed to them, trust certificates of the par value of \$70,000,000, and between 1882 and March 21, 1892, additional certificates of the par value of \$27,250,000, so that on the latter date there were outstanding certificates for 972,500 shares in the trust.

In March, 1892, the Supreme Court of Ohio decided that the making and operation of this trust of 1882 were beyond the corporate powers of the Standard Oil Company of Ohio and tended to create a monopoly, and enjoined that corporation from continuing its operation. *State v. Standard Oil*

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*Company*, 49 Ohio St. 187, 30 N. E. 279, 291, 15 L. R. A. 145, 34 Am. St. Rep. 541. A few days later, on March 21, 1892, the holders of the trust certificates met and resolved that the trust agreement was terminated on that day, that the trustees should sell all the trust property except the stocks of companies held by them, and that these stocks should be distributed to the owners of the trust certificates, who then numbered several thousands, in proportion to their respective ownerships of shares in the trust. The trustees then held stocks in 84 companies. They first transferred the stocks they held in 23 of these companies to the Standard Oil Company of New Jersey, the stocks they held in 11 of these companies to the Standard Oil Company of New York, the stocks they held in 3 of these companies to the South Penn Oil Company, the stocks they held in 4 of them to the Forest Oil Company, the stocks they held in 2 of them to the Standard Oil Company of Indiana, the stocks they held in 4 of them to the Standard Oil Company of Kentucky, the stock they held in 1 of them to the Ohio Oil Company, the stocks they held in 3 of them to the Buckeye Pipe Line Company, the stocks they held in 2 of them to the National Transit Company, and the stocks they held in 11 of them to the Anglo-American Oil Company, so that they retained the stocks [182] of the 20 principal companies, and these 20 companies held the stocks in the 64 other companies. There were outstanding trust certificates for 972,500 shares in this trust, and the owners of these certificates were the equitable owners of the stocks in all these companies. The method of division and distribution of these stocks adopted by the trustees was this: They made to each holder of a trust certificate, upon his surrender of it, a single assignment of as many 972500ths of all the stocks held by them on July 1, 1892, in each and all of these companies as the holder of the trust certificate held shares in the trust. If he had one share, he received one assignment of  $\frac{1}{972500}$  of all the stocks; and if he held 256,854 shares, he received  $\frac{256854}{972500}$  of all the shares held in the trust. But the receipt by the assignee of his share of the stock of any one of these companies was conditioned by the terms of the assignment upon his accepting his share of the stock of all of them. This method of

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distribution appears to have deterred many of the holders of trust certificates from surrendering them and accepting their shares of the stocks. The individual defendants, however, and their more intimate associates, surrendered their trust certificates and took sufficient shares of the stocks to aggregate a majority of the stock of each of the 20 companies and secured to themselves the control and management of all the companies in that way until the year 1899.

In that year the defendant the Standard Oil Company of New Jersey, a corporation, was one of the 20 companies. The par value of its capital stock was \$10,000,000. Its charter was then so amended that it was empowered to do all kinds of mining, manufacturing, trading, and transportation business, to acquire, hold, vote, sell, and assign shares of capital stock, and to carry on its business in all parts of the world. Its capital stock was increased to \$100,000,000, and the stock of the other 19 companies was exchanged for the stock of the Standard Oil Company of New Jersey, so that the latter company succeeded to the legal title to the majority of the stock of the 19 companies, and thereby to the management and control of those companies and of all the companies which they controlled. Henceforth in this discussion the Standard Oil Company of New Jersey will be called the "principal company," and the companies it then and thereafter controlled the "subsidiary companies."

Between 1899 and the filing of the bill in this case in November, 1906, the affairs of the principal company and of the subsidiary companies have been managed by the former as the business of a single person. Subsidiary companies have come and gone at its bidding, but it still holds the control of more than 30 of the chief companies whose management was committed to it in 1899. The par value of the capital stock of these companies in 1899 was about 100,000,000. In 1908 it was more than \$150,000,000. Among them are 9 companies, the owners of 16 refineries, while the principal company has several, engaged in manufacturing illuminating oil and other products of petroleum, 12 transportation companies, the owners in 1899 of 10,749 and in 1908 of 45,227 miles of gathering pipe lines, and in 1899 of 3,904 and in 1908 of 9,338 miles of trunk pipe lines, capable

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of gathering from the [183] wells and pumping oil from Pennsylvania, Indiana, Kansas, and Oklahoma to the Atlantic seaboard and to the refineries, 6 marketing companies, which in 1906 had 3,574 selling stations scattered throughout the United States, and several producing companies.

The crude oil is transported from the oil fields to the refineries by pipe lines, and the products from the refineries and storage tanks to the selling stations by tank cars, and, when exported, by ships. From 1899 to 1907 the principal company and the subsidiary companies it has operated under this trust produced more than one-tenth of the crude oil obtained in this country, transported more than four-fifths of the petroleum derived from the Pennsylvania and Indiana oil fields, manufactured more than three-fourths of all the crude oil refined in the United States, owned and operated more than one-half of all the tank cars used to distribute its products, marketed more than four-fifths of all the illuminating oil sold in the United States, exported more than four-fifths of all the illuminating oil sent forth from the United States, sold more than four-fifths of all the naphtha sold in the United States, and sold more than nine-tenths of all the lubricating oil sold to railroad companies in the United States. The principal company, by means of this trust and the commanding volume of the oil business which it acquired thereby, secured, and it has since exercised and is using, the power to prevent competition between the companies it controls, to fix for them the purchase price of the crude oil, the rates for its transportation, and the selling prices of its products. It has prevented, and is preventing, any competition in interstate and international commerce in petroleum and its products between its subsidiary companies and between those companies and itself.

The United States charged in its bill that between 1869 and 1879 the 7 individual defendants conspired to restrain interstate and international commerce in petroleum and its products, that they combined with each other and with numerous corporations and partnerships named, and by the union of competing companies, by the trust of 1879, by the trust of 1882, and by the formation and operation of the stockholding trust of 1899, they have restrained and are still

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restraining that commerce. Attention is challenged to the fact that these defendants constitute only 7 of about 5,000 stockholders of the principal company and only 7 of its 15 directors, and that they own but little more than one-third of its stock, and it is contended that no adequate proof has been presented that they are, or were in 1906, when the bill was filed, controlling or directing the operations of the principal or subsidiary corporations, or operating the stockholding trust of 1899. But a third of the stock of a great corporation, when the remainder is scattered among thousands of followers, and 7 out of 15 friendly directors, may control a board of directors and a corporation; and evidence in this case, too voluminous for recitation or review, has convinced that prior to 1879 these 7 defendants combined to secure and obtained the control of companies competing in interstate commerce in oil and suppressed their competition, that they caused the formation and execution of the trusts of 1879 and 1882, that they directed and followed that unique method of distributing the stock held in the latter trust by which it was [184] not distributed to the majority of the stockholders for many years after 1892, while they and their associates held the control of it and of the corporations it commanded, that they caused the stockholding trust of 1899, and that by means of that trust they still hold the actual control and direction of the Standard Company and of its subsidiary corporations, and that since 1899 they have been and still are engaged in carrying into effect and executing that trust.

The acts of these and other defendants prior to July 2, 1890, did not violate the Anti-Trust Act of that year, because it was not then in existence. Whether or not their transactions constituted a violation of the common law is a question much discussed, which it is unnecessary to determine in this case. However that may be, the acts of the defendants and the effect of their transactions in the conduct of the oil trade prior to July 2, 1890, which, if done thereafter, would have constituted a violation of the law of that date, are competent and material evidence of the dominant purpose and the probable effect of their similar transactions in that business since that date, and for that purpose they



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may be considered. Laying out of view the acts of the defendants prior to July 2, 1890, except as evidence of their purpose, of their continuing conduct, and of its effect, do the stockholding trust of 1899 and its continuing operation constitute an illegal restraint of interstate or international commerce, in violation of the Anti-Trust Act of 1890?

The purpose of this statute was to keep the rates of transportation and the prices of articles in interstate and international commerce open to free competition. Any contract or combination of two or more parties, whereby the control of such rates or prices is taken from separate competitors in that trade and vested in a person or an association of persons, necessarily restricts competition and restrains that commerce. The formation or maintenance by competing corporations of an association to determine their rates of transportation (*United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *United States v. Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259), agreements of competitive manufacturers and traders not to compete in the purchase or sale of articles in interstate commerce, or to buy or to sell them at prices fixed by a mutual agent or association (*Continental Wall Paper Co. v. Voight & Sons Company*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 217, 20 Sup. Ct. 96, 44 L. Ed. 136; *Id.*, 85 Fed. 271, 285-294, 29 C. C. A. 141, 155-164, 46 L. R. A. 122; *Swift & Company v. United States*, 196 U. S. 375, 395, 25 Sup. Ct. 276, 49 L. Ed. 518; *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U. S. 390, 396, 27 Sup. Ct. 65, 51 L. Ed. 241; *Montague & Company v. Lowry*, 193 U. S. 38, 41, 24 Sup. Ct. 307, 48 L. Ed. 608), the conveyance of the stock or property of competitors to a trustee or trustees to hold and operate as a single interest (*Distilling & Cattle Feeding Co. v. People*, 156 Ill. 448, 488, 41 N. E. 188, 201, 47 Am. St. Rep. 200), the exchange of the stocks or the property of competitive corporations for the stock or for interests in a single corporation, which thereby acquires the power to control the rates of transportation or the prices of articles in interstate commerce in which

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the corporations were dealing (*Northern Securities Company v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679; *United States v. American Tobacco Company* [C. C.] 164 Fed. 700, 710; *Continental Securities Company v. Interborough Rapid Transit Company* [C. C.] 165 Fed. 945, 953; *Richardson v. Buhl*, 77 Mich. 632, 636, 43 N. W. 1102, 1103, 6 L. R. A. 457; *Harding v. American Glucose Company*, 182 Ill. 551, 615, 55 N. E. 577, 598, 64 L. R. A. 738, 74 Am. St. Rep. 189; *Dunbar v. American Telephone & Telegraph Co.*, 224 Ill. 9, 23, 24, 79 N. E. 423, 427, 115 Am. St. Rep. 132), are alike declared to be illegal by this law. In the construction and enforcement of this statute, corporations are persons, they are legal entities distinct from their stockholders, and the combination of two or more of them in restraint of trade is as unlawful as the combination of individuals.

By the trust of 1899 more than 30 corporations were combined with the principal company, and that corporation was given the power to fix the rates of transportation and the purchase and selling prices which all these companies should pay and receive for petroleum and its products throughout the republic and in the traffic with foreign nations. The principal company and many of the subsidiary corporations were then and still are engaged in interstate and international commerce, many of them were capable of competing with each other in that trade, and would have been actively competitive if they had been owned by different individuals or different groups of individuals. Thus the principal company in 1899 owned and operated several refineries in New Jersey, West Virginia, and Maryland, which in the year 1906 had a capacity of 19,854,900 barrels of crude oil yearly. The Standard Oil Company of New York, one of the subsidiary companies, owned and operated several refineries in the state of New York, which in the year 1906 had a capacity of 6,732,060 barrels yearly. These companies drew much of the crude oil which they refined from, and marketed much of their products, beyond the limits of the states in which their refineries were located. The majority of the stock of the New York Company and of 18 other corporations engaged in different branches of

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the production, manufacture, and sale of petroleum and its products was conveyed to the New Jersey Company in exchange for its stock, and the latter has ever since controlled and operated all these corporations and those which they controlled, and has prevented them from competing with it or with each other.

In *Northern Securities Company v. United States*, 193 U. S. 197, 321, 322, 24 Sup. Ct. 436, 48 L. Ed. 679, Mr. Hill, Mr. Morgan, and their associates acquired the control of a majority of the voting stock of two competitive railway companies, and by means of that ownership the power to prevent them from actually competing. This group of stockholders subsequently transferred their controlling interest in the stock of each of these companies to the Northern Securities Company in exchange for its stock, and the Supreme Court decided that this transaction constituted a combination in restraint of commerce among the states, and affirmed a decree of this court which enjoined the continuance of its operation. The defendants and their associates acquired the control of a majority of the stock of more than 30 corporations, many of which were potentially and naturally competitive, prevented their competition by means of this ownership, and then by the transfer of the stock of 19 of them to the principal company in exchange for its stock placed in that company the control and management of all of them. If it was a violation of the anti-trust act to combine the control of competitive corporations in a third in the case of the Northern Securities Company, why was it not as much a violation of it to combine the control of 10 or 20 or 30 of these corporations in one of their number in the case in hand?

The defendants answer: (1) Because these corporations were not competitors, and had not been such since 1879; (2) because the stockholders of the principal company were the joint owners of the stock of the subsidiary companies, and had the right to convey their stock in the latter to the former in trust for themselves, and Congress was without power to restrict their acquisition, their method of holding, or their disposition of their title to their property, or their use of it; (3) because the corporations whose stock was

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vested in a holding company in the *Northern Securities Company's case* were railway companies, which were charged with the discharge of public duties, their performance of which was peculiarly subject to regulation by the nation and the state, while the corporations whose stock was vested in the Standard Oil Company in this case were private corporations; and (4) because, if any restraint of trade resulted from the trust of 1899, it was neither direct, immediate, nor substantial.

1. The first two answers were overruled by the Supreme Court in the case of the Northern Securities Company, and the questions they present are not debatable here. It is true, with negligible exceptions, that the stockholders of the defendant corporations were the joint equitable owners of them from 1879, or from their subsequent organizations, respectively, until July 1, 1899; but the great majority of these stockholders never held the legal title to their stock, except during a few months between 1896 and 1900. In 1899 the stockholders of the principal company were the stockholders of the subsidiary companies, and each stockholder held the same share or interest in each of the corporations. By means of this joint ownership and the trusts of 1879 and 1882, the natural competition between these corporations had been prevented for a much longer time in 1899 than had the competition between the two railway companies when their stocks were vested in the holding company in 1901 in the *Northern Securities Company's case*. But this fact cannot constitute a material difference, and in all other respects the facts of the two cases regarding competition are practically identical. Hill, Morgan, and their associates acquired control of the two railway corporations long before they placed their stock in the Securities Company in 1901. *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 16 Sup. Ct. 705, 40 L. Ed. 838. Those companies were natural and potential competitors; but this group of stockholders held the power to prevent them from actively competing, and it is as incredible that they were actually doing so after they came under the control of that group as it is that the defendant corpora[187]tions were engaged in actual competition during the nineties. It was the granting of the

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power to prevent competition to the holding company, not the subsequent exercise of that power, that in the opinion of the Supreme Court brought the combination under the ban of the law (*Harriman v. Northern Securities Company*, 197 U. S. 244, 297, 25 Sup. Ct. 493, 49 L. Ed. 739); and a similar, but greater, power was vested in the principal company in this case by the trust of 1899. For some time, therefore, before the transfer in each of these cases, a group of stockholders controlled a majority of the stock of potentially competitive corporations which they vested in the holding company, so that the latter had the power to operate them together without competition, and the rule which governs one must control the other.

2. The contention that Congress has no power to restrict the acquisition, the method of holding the title, and the disposition and the use of property, was forcibly urged upon the attention of the courts in many forms in the case of the *Northern Securities Company*, 193 U. S. 272, 273, 24 Sup. Ct. 436, 48 L. Ed. 679; but the answer to it was, as it must be here, that no question of the mere acquisition, or method of holding or of disposition, of the title to property, was there or is here in issue; that the question there was, as it is here, whether a certain method of holding the stocks which control several corporations may be used to prevent competition between them in interstate and international trade. And Congress has plenary and indisputable power under the commercial clause of the Constitution to restrict and regulate the use of every instrumentality employed in interstate or international commerce, so far as it may be necessary to do so in order to prevent the restraint thereof denounced by the Anti-Trust Act of 1890. *Northern Securities Company v. United States*, 193 U. S. 197, 334, 338, 346, 350, 24 Sup. Ct. 436, 48 L. Ed. 679; *United States v. Northern Securities Company* (C. C.) 120 Fed. 721, 729; *Addyston Pipe & Steel Company v. United States*, 175 U. S. 211, 228, 229, 20 Sup. Ct. 96, 44 L. Ed. 136; *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 284, 29 C. C. A. 141, 46 L. R. A. 122; *Smiley v. Kansas*, 196 U. S. 447, 456, 25 Sup. Ct. 289, 49 L. Ed. 546; *New Haven R. R. Co. v. Interstate Commerce Commission*, 200

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U. S. 361, 898, 26 Sup. Ct. 272, 50 L. Ed. 515; *Texas & Pacific Ry. Co. v. Mugg*, 202 U. S. 242, 245, 26 Sup. Ct. 628, 50 L. Ed. 1011; *Armour Packing Co. v. United States*, 209 U. S. 56, 82, 28 Sup. Ct. 428, 52 L. Ed. 681; *Shawnee Compress Company v. Anderson*, 209 U. S. 423, 433, 28 Sup. Ct. 572, 52 L. Ed. 865; *United States v. American Tobacco Company* (C. C.) 164 Fed. 700, 718.

3. It is true that railway corporations owe duties to the public which do not rest upon trading, manufacturing, and private transportation companies, such as the duty to operate continually their railroads and the duty to carry persons and property presented for transportation at reasonable rates; but the power of Congress to regulate interstate and foreign commerce and the exertion of that power manifested in the Anti-Trust Act embrace all persons and corporations engaged in such commerce, as is amply illustrated in the various applications of the act which have been made in the several decisions here cited. The mis[188]chief against which that law was leveled is not less threatening from a vast combination of private corporations owning and using in interstate and foreign commerce property worth hundreds of millions of dollars than from a combination of two railway companies. The act makes no distinction between them, it excepts neither class, and where Congress has made no exception it is not the province of the courts to do so. No countervailing reason overcomes these considerations, and the vesting of the majority of the stock of many potentially competitive private corporations engaged in interstate commerce in a holding company, which would be violative of the Anti-Trust Act if made by the stockholders of railway companies of that character, must be subject to the condemnation of that statute.

The purpose of the act of July 2, 1890, was to prevent the stifling and the substantial restriction of competition in interstate and international commerce. The test under that act of the legality of a combination or conspiracy is its direct and necessary effect upon such competition. If its necessary effect is but incidentally or indirectly to restrict competition, while its chief result is to foster the trade and increase

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the business of those who make and operate it, it is not violative of this law. *Hopkins v. United States*, 171 U. S. 578, 592, 19 Sup. Ct. 40, 43 L. Ed. 290; *Anderson v. United States*, 171 U. S. 604, 606, 19 Sup. Ct. 50, 43 L. Ed. 300; *United States v. Joint Traffic Association*, 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 245, 20 Sup. Ct. 96, 44 L. Ed. 186. But if its necessary effect is to stifle, or directly and substantially to restrict, free competition in commerce among the states or with foreign nations, it is a combination or conspiracy in restraint of that trade, and it falls under the ban of the act. *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 339, 340, 342, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Addyston Pipe & Steel Company v. United States*, 175 U. S. 211, 234, 20 Sup. Ct. 96, 44 L. Ed. 186; *United States v. Joint Traffic Association*, 171 U. S. 505, 576, 577, 19 Sup. Ct. 25, 43 L. Ed. 259; *United States v. Northern Securities Company* (C. C.) 120 Fed. 721, 722.

And the power to restrict competition in interstate and international commerce, vested in a person or an association of persons by a contract or combination, is indicative of its character; for it is to the interest of the parties that such a power should be exercised, and the presumption is that it will be. In the case under consideration it has been exercised, and thereby the principal company has prevented competition between the corporations it controls since 1899. In *Harriman v. Northern Securities Company*, 197 U. S. at page 291, 25 Sup. Ct. 503, 49 L. Ed. 739, Chief Justice Fuller, speaking of the decision in the case of the Northern Securities Company, said:

"For the purposes of that suit it was enough that in any capacity the Securities Company had the power to vote the railway shares and to receive the dividends thereon. The objection was that the exercise of its powers, whether those of owner or of trustee, would tend to prevent competition, and thus to restrain commerce. Some of our number thought that, as the Securities Company owned the stock, the relief sought could not be granted; but the conclusion was that the possession of the power, which, if exercised, would prevent [189] competition, brought the case within the statute, no matter what the tenure of title was."

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4. Counsel argue with persuasive force that the transfer of the stock of the 19 corporations to the principal company wrought no substantial restriction of competition, because the owners of that stock had and exercised the same power of restraint before that transfer that was vested in the Standard Oil Company of New Jersey thereafter. But the power of the principal company after the transfer of 1899 to fix the prices at which the 30 corporations should buy and sell the articles in which they dealt, the terms of their purchases and sales, their rates for the transportation of oil and its products, and all the infinite details of their vast operations in which they might compete, and thereby to prevent their competition, was greater, more easily and quickly exercised, and hence more effective, than it could have been in the hands of 3,000 scattered stockholders. The trust deed of 1879, the trust agreement of 1882, the withholding of the separate certificates of shares of stock in each corporation from the holders of the trust certificates in the dissolution of that trust until they took their shares in all of the corporations, bear convincing testimony to the soundness of this proposition. The combination formed by that transfer and its power to restrict competition were less liable to be destroyed, more reliable and permanent, than those springing from the joint ownership by 3,000 stockholders of each corporation. There is much more probability that corporations potentially competitive will separate and compete, when each of their stockholders has a separate certificate of his shares of stock in each corporation, which he is free to sell, than when a majority of the stock of each of the corporations is held by a single corporation, which has the power to vote the stock and to operate them. And although the group of stockholders led by Mr. Hill and Mr. Morgan had the same power to prevent competition between the two railway companies that the stockholders of these corporations had to prevent competition between them, the Supreme Court held in the case of the Northern Securities Company that their transfer of their stock to the holding company granted to that corporation a power so much greater and more effective than that held by the stockholders of the railway companies that the necessary



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effect of it was a restriction of competition so direct and substantial that it made it an illegal combination in restraint of interstate commerce.

Because the power to restrict competition in interstate commerce granted to the Standard Oil Company of New Jersey by the transfer to it of the stock of the 19 companies and of the authority to manage and operate them and the other corporations which they controlled was the absolute power to prevent competition among any of these corporations, because this power was greater, more easily exercised, more effective, and more durable than that which the 3,000 stockholders of these corporations previously had, because many of these corporations were potentially competitive and were engaged in interstate commerce, and the necessary effect of the transfer of the stock of the 19 companies to the holding company was, under the decision in the case of the Northern Securities Company, a direct and substantial restric[190]tion of that commerce, that transfer and the operation of the companies under it constituted a combination or conspiracy in restraint of interstate and international commerce in violation of the Anti-Trust Act of July 2, 1890.

This court is not authorized to punish past violations of this law in this suit. Its power is "to prevent and restrain violations of this act," and the defendants insist that the United States is entitled to no relief. because it has failed to prove that they are now violating. or that when the bill was filed they were violating, this law. But the power to vote the stock, to elect the officers of the subsidiary corporations, to control and operate them, and thereby to restrict their competition in interstate and international commerce. was illegally granted to the Standard Oil Company of New Jersey in 1899, and that company ever since has exercised unlawfully and is still so using that authority, the seven individual defendants are dominating and directing its exercise of this power, the subsidiary corporations are knowingly submitting to and assisting that exercise, and all of them are participating in the fruits of it. These are menacing and continuing violations of the act which Congress has imposed the duty upon the courts to restrain and prevent.

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The second section of the Anti-Trust Act declares that:

“Every person who shall monopolize, or attempt to monopolize, or combine, or conspire, with any other person or persons to monopolize any part of trade or commerce among the several states or with foreign nations shall be guilty of a misdemeanor.”

The United States alleges in its bill that the object and effect of the illegal combination and conspiracy, which has been found to exist, were to monopolize, and that the defendants combined and conspired to monopolize, a substantial part of interstate and international commerce in petroleum and its products, in violation of this section of the law. It also avers that at various times between 1870 and the date of the filing of the bill the defendants (1) secured from common carriers preferential rates and rebates; (2) made contracts with some of their competitors which limited the production, output, and markets of the latter; (3) operated companies represented to be independent, when they were not so; (4) procured from employees of railroads information of the trade of competitors, and used it to destroy the latter's business and to secure the commerce for themselves; and (5) sold their products at times and places where there was competition below remunerative prices, and recouped their losses by selling such products at high prices at other times and places.

The gist of the violation of the second section of the act charged in the bill, however, is not the monopolization of interstate or international commerce by a single person or corporation. It is the combination and conspiracy of the numerous defendants, many of them formerly competitors, to restrain trade and to monopolize that commerce, and the burden of its prayer is that the continuance of this combination and conspiracy may be enjoined.

The proof is conclusive that the defendants have secured and now enjoy a very substantial part of the interstate and international commerce in petroleum and its products. But counsel for the defendants insist that this does not constitute an unlawful monopoly, that such a monopoly does not result from the magnitude or proportion of the commerce obtained by one or more individuals or corporations,

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unless unlawful means are used to obtain it, and that the power of the court to enjoin under the second section is limited to the prohibition of the use of continuing or threatened unlawful means and their like which have a direct and substantial effect to continue the illegal monopoly.

Undoubtedly every person engaged in interstate commerce necessarily attempts to draw to himself, to the exclusion of others, and thereby to monopolize, a part of that trade. Every sale and every transportation of an article which is the subject of interstate commerce evidences a successful attempt to monopolize that trade or commerce which concerns that sale or transportation. If the second section of the act prohibits every attempt to monopolize any part of interstate commerce, it forbids all competition therein, and defeats the only purpose of the law; for there can be no competition, unless each competitor is permitted to attempt to draw to himself, and thereby to monopolize, some part of the commerce. This is not, it cannot be, the proper interpretation of this section. It must be so construed as to abate the mischief it was passed to destroy and to promote the remedy it provided. It was enacted, not to stifle, but to foster, competition, and its true construction is that, while unlawful means to monopolize and to continue an unlawful monopoly of interstate and international commerce are misdemeanors and enjoined under it, monopolies of part of interstate and international commerce by legitimate competition, however successful, are not denounced by the law, and may not be forbidden by the courts. *Whitwell v. Continental Tobacco Co.*, 60 C. C. A. 290, 298, 125 Fed. 454, 462, 64 L. R. A. 689; *Phillips v. Iola Portland Cement Company*, 61 C. C. A. 19, 20, 125 Fed. 593, 594.

But in the case under consideration the combination and conspiracy in restraint of trade and its continued execution, which have been found to exist, constitute illegal means by which the conspiring defendants combined, and still combine and conspire, to monopolize a part of interstate and international commerce, and by which they have secured an unlawful monopoly of a substantial part of it, and this conspiracy constitutes as clear and complete a violation of the second as

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of the first section of the act. Upon the ground that the defendants have thus violated, and are violating the second section of the act, as fully as upon the ground that they have violated its first section, the decree in favor of the government must be, and is, based.

The combination and conspiracy, including in those terms the illegal devices by which they were created and are continued, were the source, and they are the support, of the unlawful monopoly. Without them it would not have existed and cannot continue, and the continued use of these and like means, including the distribution of the stock of the various defendants ratably among the shareholders of the Standard Oil Company, and the conveyance of the physical property and business of the defendants to one of their number to perpetuate the unlawful monopoly, must be, and it is, prohibited by the decree herein.

As illegal means whereby the unlawful monopoly was created and is maintained have been proved and found in the combination and con[192]spiracy, and as their use to prolong the unlawful monopoly must be enjoined, the questions whether or not the charges in the bill that other unlawful means were or are employed are true, and whether or not the power of the court to prevent the existence or continuance of a monopoly is limited to the prohibition of the use of illegal means and their like have become moot, and it is unnecessary to express any opinion upon them.

It is a grave and delicate task to determine the exact limits of the relief to which the government is entitled. The prohibition of the court must forbid the performance of the continuing and threatened illegal acts which have had, and are having, a direct and substantial effect to restrain commerce among the states and with foreign nations, and to continue the unlawful monopoly and all like acts which have the same effect. But it may not prohibit all possible violations of the law, and thus put the whole conduct of the defendant's business at the peril of a summons for contempt. Past unlawful competition does not deprive parties of their right to conduct lawful competition. *New York, N. H. & H. R. R. v. Interstate Commerce Commission*, 200 U. S. 361, 404, 26

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Sup. Ct. 272, 282, 50 L. Ed. 515. The court must steer as best it may (*Swift & Company v. United States*, 196 U. S. 375, 396, 25 Sup. Ct. 276, 279, 49 L. Ed. 518) between its duty "to prevent and restrain violations of" this act of Congress and its duty not to deprive the defendants of their right to engage in lawful competition for interstate and international commerce. In our opinion this duty will be discharged, the rights of the defendants to engage in lawful competition for interstate and international commerce will not be infringed, and the full relief to which the United States is entitled under the law and the evidence will be granted by a decree in its favor to the following effect:

That the Standard Oil Company of New Jersey, the seven individual defendants, and all of the subsidiary defendant companies engaged in commerce in petroleum or its products among the states or with foreign nations controlled by the principal company, have entered into and are operating a combination or conspiracy in restraint of trade and commerce among the several states, such as is denounced as illegal by section 1 of the Anti-Trust Act of July 2, 1890, and have combined and conspired to monopolize, have secured thereby an unlawful monopoly of, and are combining and conspiring to continue to monopolize, a substantial part of interstate and international commerce in violation of section 2 of that act; that the Standard Oil Company of New Jersey be enjoined from voting the stock in any of these defendant companies which it acquired by virtue of that combination, and from exercising or attempting to exercise any control, direction, supervision, or influence over the acts of any of these companies by virtue of its holding of the stock and power secured through that combination; that the other defendant companies which are parties to the combination be enjoined from declaring or paying any dividends to the Standard Oil Company on account of any stock acquired by it through that combination, from permitting that company to vote such stock or to direct the policy of any of said companies, or to exercise any control whatsoever over their corporate acts by virtue of the stock or power [193] which it secured by means of that combination; that the seven individual defendants and the corporations and partnerships that became

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parties to this combination be enjoined from continuing it or carrying it out, and from entering into or performing any like combination the effect of which is, or will be, to restrain or monopolize, or to continue their unlawful monopoly of interstate commerce in petroleum and its products, in violation of the Anti-Trust Act, either (1) by placing the control of any of said corporations in a trustee, or in a group of trustees, by means of the holding of its stock or property by others than its equitable owners, by causing the conveyance of the physical property and business of two or more potentially competitive parties to the combination to any party thereto, or by any other such act, or (2) by making any express or implied agreement or arrangement together, or one with another, like that adjudged illegal hereby, relative to the control or management of any of said corporations, or the price or terms of purchase or of sale, or the rates of transportation of petroleum or its products in interstate or international commerce, or relative to the quantities thereof purchased, sold, transported, or manufactured by any of said corporations, which will have a like effect in restraint of commerce among the states, in the territories, and with foreign nations to that of the combination the operation of which is hereby enjoined; that the defendants who are parties to the combination be enjoined from engaging or continuing in interstate commerce in petroleum and its products during the continuance of the illegal combination; that the United States recover its costs of the defendants who are parties to the combination, and that the other defendants be dismissed.

VAN DEVANTER, HOOK, and ADAMS, Circuit Judges, concur.

HOOK, Circuit Judge (concurring).

The principal conclusions, upon which we are all agreed, may be briefly stated as follows: A holding company, owning the stocks of other concerns whose commercial activities, if free and independent of a common control, would naturally bring them into competition with each other, is a form of trust or combination prohibited by section 1 of the Sherman

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**Anti-Trust Act.** The Standard Oil Company of New Jersey is such a holding company. The defendants, who are in the combination, are enjoined from continuing it, and from forming another like it. The holding company is enjoined from exercising the rights of a stockholder in the subordinate companies, and they are enjoined from allowing it to do so or to benefit therefrom in the way of dividends. A means of dissolving the present form of combination is left open, to wit: The distribution among the stockholders of the holding company of the stocks it owns in the subordinate companies, to the end that each corporate member of the combination engaging in interstate or foreign commerce shall in the future have and exercise corporate independence, with its own particular set of stockholders not united with or tied to those of its competitors, actual or potential, under a single or common control. Until the defendants discontinue the operation of the combination, they are denied the right to engage in commerce among the states or in [194] the territories. The defendants in the combination are also monopolizing interstate and foreign commerce in petroleum and its products, contrary to section 2 of the act. A wrongful method employed to gain the monopoly is found to exist in the unlawful combination above mentioned, and it therefore becomes unnecessary to determine the other charges upon that subject in the petition of the government. It is thought that with the end of the combination the monopoly will naturally disappear; but lest, instead of resulting that way, the monopoly so wrongfully gained be perpetuated by the aggregation of the physical properties and instrumentalities by which it is maintained in the hands of a member of the combination and the liquidation and retirement from business of the other members, it is held that such a course would violate the decree.

The issues in the case before us and the scope of the arguments of counsel make it not inappropriate that I express more fully, but in a general way, my views of the proper construction of the Anti-Trust Act, particularly of the second section, directed against the monopolizing of interstate and

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foreign commerce. The extent and limitations of the first section have been pretty well defined in the many adjudged cases. The construction of the act should not be so narrow or technical as to belittle the work of Congress; but, on the contrary, it should accord with the great importance of the subject of the legislation and the broad lines upon which the act was framed. The language employed in the act is as comprehensive as the power of Congress in the premises, and the purpose was not to hamper business fairly conducted, but adequately to promote the common interest in freedom of competition and to remove improper obstacles from the channels of commerce that all may enter and enjoy them. The wisdom of a law lies in its spirit as well as in its letter, and unless they go together in its construction and application justice goes astray.

The true test to apply to a case under the first section is not whether the restraint upon competition imposed by the contract or combination in question should be regarded as reasonable or as unreasonable, but whether it is direct and appreciable. Conceptions of the reasonable and unreasonable are much too diverse to afford a stable, uniform rule for construing a law which contains no mention of those terms. So much depends upon the point of view, that it frequently happens that what appears to one to be wholly unreasonable is thought entirely reasonable by another. But if the restraint is direct and appreciable, and not merely incidental to some contract having a lawful purpose, it falls clearly within the prohibition of the statute, and there is no room for further construction. There are many contracts which, in the days when the common law was forming, would have been adjudged contrary to public welfare, as being in restraint of the narrow trade of those times, but which in a commercial age like the present have such a negligible effect in that direction as to be no longer evil within the meaning of the law. Their effect is so indirect and inappreciable that it is properly referable to the class *de minimis*, and it is not to be supposed Congress had them in view when it legislated to preserve freedom of competition in the broad




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field of interstate and foreign [195] commerce. Vital principles; however, have not changed; the change is merely in the conditions upon which they operate.

The second section of the act provides:

"Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor," etc.

Manifestly this section is quite distinct from the first, and was not intended to cover precisely the same ground. To say otherwise would be to impute to Congress the doing of the unnecessary and useless. Though the natural tendency of a combination in restraint of trade declared illegal by section 1 may be and generally is towards monopoly denounced by section 2, and may even accomplish it, yet the scope of the latter section is far broader and was designed to extend also to monopolies secured by other means than by contracts, combinations, and conspiracies in restraint of trade, which, as those terms necessarily imply, require concert between two or more persons or corporations. One person or corporation may offend against the second section by monopolizing, but the first section contemplates conduct of two or more. A cursory reading of the act shows this. That it was the intention of Congress to condemn monopolies, not based on illegal combinations among several, but secured by single persons, natural or artificial, by other means, also appears from the history of the legislation. The bill originally introduced in the Senate bore slight resemblance to the law finally enacted, and there was uncertainty as to the particular constitutional authority for the legislation. At one time it was thought by some to rest upon the jurisdiction of the courts of the United States of controversies between citizens of different states, and at another there were provisions regarding competition between the products and manufactures of one state with those of another. Finally, after much difference of view, the bill, with many amendments, was referred to the judiciary committee of which Senator Edmunds was chairman, and reframed by it under the commerce clause of the Constitution. It was then re-



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ported in the simple, comprehensive form in which it finally became a law. A motion was made to amend the second section by striking out the words "monopolize or attempt to monopolize" so it would read:

"Every person who shall combine or conspire with any other person or persons to monopolize," etc.

But it was rejected.

What is a monopoly in contravention of the statute? I would not say that every person who strives to gain as much as he can of the commerce in a commodity is thereby attempting to monopolize that commerce, within the meaning of the term as it is employed in legislative acts and understood in the courts. Magnitude of business does not, alone, constitute a monopoly, nor effort at magnitude an attempt to monopolize. To offend the act the monopoly must have been secured by methods contrary to the public policy as expressed in the statutes or in the common law. The wrongful element in a monopoly under the act is not necessarily the violation of some penal statute, but [196] may consist of other acts or conduct which the law condemns and the benefit of which, if sought in a civil court of justice, could not be obtained. And it may be observed in this connection that there is more of the decalogue in the common law respecting the trading of merchants than is sometimes supposed. On the other hand, Congress did not intend to impede legitimate commercial activity, nor put a limit to its fruits. The genius and industry of man, when kept to ethical standards, still have full play, and what he achieves is his; and this applies as well to a corporation, in which the energies of many are concentrated under the authority of law in a single organization. A railroad company, for instance, which has extended its lines across the continent and conquered the waste or wilderness, is not a monopoly within the statute merely because its capital is great and it alone serves the tributary country; and so of an industrial corporation, the wisdom and business sagacity of whose managers have foreseen and taken advantage of the natural tendencies of trade and caused it to outstrip all competition. Success and magnitude of busi-

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ness, the rewards of fair and honorable endeavor, were not among the evils which threatened the public welfare and attracted the attention of Congress. But when they have been attained by wrongful or unlawful methods, and competition has been crippled or destroyed, the elements of monopoly are present. A governmental grant of special privileges is no longer essential, though in England the Crown was for a period the frequent source of monopolies, which were condemned by the courts and finally by Parliament as contrary to public welfare. It was these Bacon had in mind in his advice to Villiers:

"But especially care must be taken that monopolies, which are the cankers of all trading, be not admitted under specious colors of public good."

The modern doctrine is but a recognition of the obvious truth that what a government should not grant, because injurious to public welfare, the individual should not be allowed to secure and hold by wrongful means. The baneful effect is the same, whether the monopoly comes as a gift from a government or is the result of individual wrongdoing. Nor can arguments of reduced prices of product, economy in operation, and the like, have weight. One English sovereign was accustomed to recite in the preambles of royal grants of monopolies the special benefits to be derived; but it was then, and is now, almost universally believed that the ultimate, if not the immediate, effect upon the development of trade and commerce is detrimental, and that belief, so generally prevalent and enduring, has been embodied in legislation, the policy of which is not open to question in the courts.

During the discussion of the amendment above referred to, apprehension was expressed over the broad language of the second section of the proposed act, and inquiry was made whether the committee having the bill in charge intended it should make it an offense if an individual engaged in interstate and foreign commerce, "by his own skill and energy, by the propriety of his conduct generally, shall pursue his calling in such a way as to monopolize a trade." Assurances

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were given that the term "monopolize" had no such signification, but that it contemplated the employment of means which prevented others [197] from engaging in fair competition, the engrossing of the trade, and the like. Undoubtedly this view prevailed at the passage of the law.

**DECREE.**

After deliberation, it was ordered, adjudged, and decreed:

SECTION 1. That in and prior to the year 1899 there were 20 corporations, organized, respectively, under the laws of various states, engaged in commerce in petroleum and its products, either among the states, or in the territories, or with foreign nations, and these corporations held a majority of the stock and controlled the business and operations of many other corporations engaged in that commerce; that one of these corporations was the Standard Oil Company of New Jersey, hereafter called the Standard Company, which had a capital stock of \$10,000,000; that since the year 1890 the defendants named in section 2 of this decree have entered into and are carrying out a combination or conspiracy in pursuance whereof about the year 1899 they caused the capital stock of the Standard Company to be increased to \$100,000,000, caused a majority of the stock of the 19 companies, and the power to control them, and to manage their trade, and the power to control the corporations which they controlled and to manage their trade, to be vested in and held by the Standard Company in exchange for its stock, which was issued to the former holders of the stock of the 19 companies, and caused the Standard Company ever since to control all these corporations, hereafter called the subsidiary corporations, and to manage their trade without competition among themselves as the trade and business of a single person; that this combination or conspiracy is a combination or conspiracy in restraint of trade and commerce in petroleum and its products among the several states, in the territories, and with foreign nations, such as an act of Congress approved July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), entitled "An act to protect trade and commerce against unlawful restraints and monopolies," declares to be illegal.


SEC. 2. That the defendants John D. Rockefeller, William Rockefeller, Henry H. Rogers, Henry M. Flagler, John D. Archbold, Oliver H. Payne, and Charles M. Pratt, hereafter called the seven individual defendants, united with the Standard Company and other defendants to form and effectuate this combination, and since its formation have been and still are engaged in carrying it into effect and continuing it; that the defendants Anglo-American Oil Company (Limited), Atlantic Refining Company, Buckeye Pipe Line Company, Borne-Scrymser Company, Chesebrough Manufacturing Company, Consoli-

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dated, Cumberland Pipe Line Company, Colonial Oil Company, Continental Oil Company, Crescent Pipe Line Company, Henry C. Folger, Jr., and Calvin N. Payne, a copartnership doing business under the firm name and style of Corsicana Refining Company, Eureka Pipe Line Company, Galena Signal Oil Company, Indiana Pipe Line Company, Manhattan Oil Company, National Transit Company, New York Transit Company, Northern Pipe Line Company, Ohio Oil Company, Prairie Oil & Gas Company, Security Oil Company, Solar Refining Company, Southern Pipe Line Company, South Penn Oil Company, Southwest Pennsylvania Pipe Lines Company, Standard Oil Company of California, Standard Oil Company of Indiana, Standard Oil Company of Iowa, Standard Oil Company of Kansas, Standard Oil Company of Kentucky, Standard Oil Company of Nebraska, Standard Oil Company of New York, Standard Oil Company of Ohio, Swan & Finch Company, Union Tank Line Company, Vacuum Oil Company, Washington Oil Company, and Waters-Pierce Oil Company, have entered into and became parties to this combination and are either actively operating or aiding in the operation of it; that by means of this combination the defendants named in this section have combined and conspired to monopolize, have monopolized, and are continuing to monopolize a substantial part of the commerce among the states, in the territories, and with foreign nations, in violation of section 2 of the Anti-Trust Act.

Sec. 3. That the defendants Argand Refining Company, American Lubricating Oil Company, Acme Oil Company, Baltimore United Oil Company, Buffalo Natural Gas Fuel Company, Bush & Denslow Manufacturing Company, [198] Camden Consolidated Oil Company, Commercial Natural Gas Company, Connecting Gas Company, Eastern Ohio Oil & Gas Company, Eclipse Lubricating Oil Company, Florence Oil & Refining Company, Franklin Pipe Company (Limited), Lawrence Natural Gas Company, Mahoning Gas Fuel Company, Mountain State Gas Company, National Fuel Gas Company, Northwestern Ohio Natural Gas Company, Oil City Fuel Supply Company, Oswego Manufacturing Company, Pennsylvania Gas Company, Pennsylvania Oil Company, People's Natural Gas Company, Pittsburg Natural Gas Company, Platt and Washburn Refining Company, Republic Oil Company, Salamanca Gas Company, Standard Oil Company of Minnesota, Taylorstown Natural Gas Company, Tide Water Oil Company, Tide Water Pipe Company (Limited), United Natural Gas Company, and United Oil Company, have not been proved to be engaged in the operation or carrying out of the combination, and the bill is dismissed as against each of them.

Sec. 4. That in the formation and execution of the combination or conspiracy the Standard Company has issued its stock to the amount of more than \$90,000,000 in exchange for the stocks of other corporations which it holds, and it now owns and controls all of the capital stock of many corporations, a majority of the stock or controlling



## Decree.

Interests in some corporations, and stock in other corporations as follows:

| Name of company.                                    | Total capital stock. | Owned by Standard Oil Company. |
|---|----------------------|--------------------------------|
| Anglo-American Oil Company (Limited).....           | £1,000,000           | \$999,740                      |
| Atlantic Refining Company.....                      | \$5,000,000          | \$5,000,000                    |
| Borne-Scrimser Company.....                         | 200,000              | 199,700                        |
| Buckeye Pipe Line Company.....                      | 10,000,000           | 9,999,700                      |
| Chesebrough Manufacturing Company Consolidated..... | 500,000              | 277,700                        |
| Colonial Oil Company.....                           | 250,000              | 249,300                        |
| Continental Oil Company.....                        | 300,000              | 300,000                        |
| Crescent Pipe Line Company.....                     | 3,000,000            | 3,000,000                      |
| Eureka Pipe Line Co.....                            | 5,000,000            | 4,999,400                      |
| Galena Signal Oil Company.....                      | 10,000,000           | 7,079,500                      |
| Indiana Pipe Line Company.....                      | 1,000,000            | 999,700                        |
| Lawrence Natural Gas Company.....                   | 450,000              | 450,000                        |
| Mahoning Gas Fuel Company.....                      | 150,000              | 149,900                        |
| Mountain State Gas Company.....                     | 500,000              | 500,000                        |
| National Transit Company.....                       | 25,455,200           | 25,451,650                     |
| New York Transit Company.....                       | 5,000,000            | 5,000,000                      |
| Northern Pipe Line Company.....                     | 4,000,000            | 4,000,000                      |
| Northwestern Ohio Natural Gas Company.....          | 2,775,250            | 1,649,450                      |
| Ohio Oil Company.....                               | 10,000,000           | 9,999,850                      |
| People's Natural Gas Company.....                   | 1,000,000            | 1,000,000                      |
| Pittsburg Natural Gas Company.....                  | 310,000              | 310,000                        |
| Solar Refining Company.....                         | 500,000              | 499,400                        |
| Southern Pipe Line Company.....                     | 10,000,000           | 10,000,000                     |
| South Penn Oil Company.....                         | 2,800,000            | 2,800,000                      |
| Southwest Pennsylvania Pipe Lines.....              | 3,500,000            | 3,500,000                      |
| Standard Oil Company of California.....             | 17,000,000           | 16,999,800                     |
| Standard Oil Company of Indiana.....                | 1,000,000            | 999,000                        |
| Standard Oil Company of Iowa.....                   | 1,000,000            | 1,000,000                      |
| Standard Oil Company of Kansas.....                 | 1,000,000            | 999,300                        |
| Standard Oil Company of Kentucky.....               | 1,000,000            | 997,200                        |
| Standard Oil Company of Nebraska.....               | 600,000              | 599,500                        |
| Standard Oil Company of New York.....               | 15,000,000           | 15,000,000                     |
| Standard Oil Company of Ohio.....                   | 3,500,000            | 3,499,400                      |
| Swan & Finch Company.....                           | 100,000              | 100,000                        |
| Union Tank Line Company.....                        | 3,500,000            | 3,499,400                      |
| Vacuum Oil Company.....                             | 2,500,000            | 2,500,000                      |
| Washington Oil Company.....                         | 100,000              | 71,490                         |
| Waters-Pierce Oil Company.....                      | 400,000              | 274,700                        |

[199] That the defendant National Transit Company, which is owned and controlled by the Standard Oil Company as aforesaid, owns and controls the amounts of the capital stocks of the following named corporations and limited partnerships stated opposite each, respectively, as follows:

| Name of company.                     | Total capital stock. | Owned by National Transit Company |
|--------------------------------------|----------------------|-----------------------------------|
| Connecting Gas Company.....          | \$825,000            | \$412,000                         |
| Cumberland Pipe Line Company.....    | 1,000,000            | 998,500                           |
| East Ohio Gas Company.....           | 6,000,000            | 5,999,500                         |
| Franklin Pipe Company (Limited)..... | 50,000               | 19,500                            |
| Prairie Oil & Gas Company.....       | 10,000,000           | 9,999,500                         |

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That the Standard Company has also acquired the control, by the ownership of its stock or otherwise, of the Security Oil Company, a corporation created under the laws of Texas, which owns a refinery at Beaumont, in that state, and the Manhattan Oil Company, a corporation which owns a pipe line situated in the states of Indiana and Ohio; that the Standard Company, and the corporations and partnerships named in section 2, are engaged in the various branches of the business of producing, purchasing, and transporting petroleum in the principal oil-producing districts of the United States, in New York, Pennsylvania, West Virginia, Tennessee, Kentucky, Ohio, Indiana, Illinois, Kansas, Oklahoma, Louisiana, Texas, Colorado, and California, in shipping and transporting the oil through pipe lines owned or controlled by these companies from the various oil-producing districts into and through other states, in refining the petroleum and manufacturing it into various products, in shipping the petroleum and the products thereof into the states and territories of the United States, the District of Columbia, and to foreign nations, in shipping the petroleum and its products in tank cars owned or controlled by the subsidiary companies into various states and territories of the United States and into the District of Columbia, and in selling the petroleum and its products in various places in the states and territories of the United States, in the District of Columbia, and in foreign countries; that the Standard Company controls the subsidiary companies and directs the management thereof, so that none of the subsidiary companies competes with any other of those companies or with the Standard Company, but their trade is all managed as that of a single person.

Sec. 5. That the stocks of the various corporations which are named in section 2 and described in section 4 of this decree, held by the Standard Company, were acquired and are held by it by virtue of the illegal combination; that the Standard Company, its directors, officers, agents, servants, and employees, are enjoined and prohibited from voting any of the stock in any of the subsidiary companies named in section 2 of this decree and from exercising or attempting to exercise any control, direction, supervision, or influence over the acts of these subsidiary companies by virtue of its holding of their stock. And these subsidiary companies, their officers, directors, agents, servants, and employees are, and each of them is, enjoined and prohibited from declaring or paying any dividends to the Standard Company on account of any of the stock of these subsidiary companies held by the Standard Company, and from permitting the latter company to vote any stock in, or to direct the policy of, any of said companies, or to exercise any control whatsoever over the corporate acts of any of said companies by virtue of such stock, or by virtue of the power over such subsidiary corporation acquired by means of the illegal combination. But the defendants are not prohibited by this decree

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from distributing ratably to the shareholders of the principal company the shares to which they are equitably entitled in the stocks of the defendant corporations that are parties to the combination.

SEC. 6. That the defendants named in section 2 of this decree, their officers, directors, agents, servants, and employees, are enjoined and prohibited from continuing or carrying into further effect the combination adjudged illegal hereby, and from entering into or performing any like combination or conspiracy, the effect of which is, or will be, to restrain commerce in petroleum or its products among the states, or in the territories, or with foreign [200] nations, or to prolong the unlawful monopoly of such commerce obtained and possessed by defendants as before stated, in violation of the act of July 2, 1890, either (1) by the use of liquidating certificates, or other written evidences, of a stock interest in two or more potentially competitive parties to the illegal combination, by causing the conveyance of the physical property and business of any of said parties to a potentially competitive party to this combination, by causing the conveyance of the property and business of two or more of the potentially competitive parties to this combination to any party thereto, by placing the control of any of said corporations in a trustee, or group of trustees, by causing its stock or property to be held by others than its equitable owners, or by any similar device, or (2) by making any express or implied agreement or arrangement together, or one with another, like that adjudged illegal hereby relative to the control or management of any of said corporations, or the price or terms of purchase, or of sale, or the rates of transportation, of petroleum or its products in interstate or international commerce, or relative to the quantities thereof purchased, sold, transported, or manufactured by any of said corporations, which will have a like effect in restraint of commerce among the states, in the territories, and with foreign nations to that of the combinations the operation of which is hereby enjoined.

SEC. 7. The defendants named in section 2 of this decree are enjoined and prohibited, until the discontinuance of the operation of the illegal combination, from engaging or continuing in commerce among the states, or in the territories of the United States.

SEC. 8. The United States shall recover its costs herein, to be taxed by the clerk of the court, and shall have execution therefor.

SEC. 9. This decree shall take effect thirty (30) days after its entry in case no appeal is taken from it. If an appeal is taken from this decree by the defendants, or by any of them, and a bond in the amount of fifty thousand dollars (\$50,000) conditioned to operate as a supersedeas approved by one of the circuit judges is given within thirty (30) days after the entry of this decree, then this decree, unless reversed or modified, shall take effect thirty (30) days after the final decision of this case by the Supreme Court upon the appeal.



**Syllabus.**

**[737] UNION PACIFIC COAL CO. *v.* UNITED STATES.**

(Circuit Court of Appeals, Eighth Circuit. November 19, 1909.)

[173 Fed. Rep., 737.]

**MONOPOLIES (§12)—ANTI-TRUST ACT—TEST OF "UNLAWFUL COMBINATION."**—The test of an "unlawful combination" under Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200) is its necessary effect upon free competition in commerce among the states or with foreign nations. A combination, the necessary effect of which is to stifle, or directly and substantially to restrict, such competition, is unlawful under that act.<sup>a</sup> But if the necessary effect of a combination is but incidentally and indirectly to restrict competition, while its chief result is to foster the trade and increase the business of those who make and operate it, it does not fall under the ban of this law.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

For other definitions, see Words and Phrases, vol. 2, pp. 1275, 1276; vol. 8, p. 7606.]

**MONOPOLIES (§ 17)—ANTI-TRUST ACT—VENDORS NOT FORBIDDEN TO FIX PRICES AND TERMS OF SALE OF COAL THEREBY.**—A coal company engaged in mining and selling its coal is not prohibited by the anti-trust act (Act July 2, 1890, c. 647, § 1, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), or by the law, from refusing to sell its coal, from selecting its customers, from fixing the price and terms on which it will sell its product, or from selling to different customers for different prices and on different terms.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 17.]

**CORPORATIONS (§ 280)—CRIMES—STOCKHOLDERS—GUILT OF CORPORATION NOT IMPUTED TO STOCKHOLDER.**—A violation of a law by a corporation does not render its nonparticipating stockholders criminally liable therefor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1186; Dec. Dig. § 280.]

**CRIMINAL LAW (§§ 741, 1159)—SUFFICIENCY OF PROOF—EVIDENCE OF GUILT MUST EXCLUDE EVERY OTHER HYPOTHESIS—APPEAL.**—Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused. And where all the substantial evidence is as consistent with innocence as with

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<sup>a</sup> Syllabus copyrighted, 1910, by West Publishing Company.

## Syllabus.

guilt, it is the duty of the appellate court to reverse a judgment of conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1713, 1727, 3074-3083; Dec. Dig. §§ 741, 1159.]

**MONOPOLIES (§ 31)—EVIDENCE—CONCLUSION.**—The Union Pacific Coal Company, Moore, its western sales agent, the Union Pacific Railroad Company, which owned all the stock of the coal company, the Oregon Short Line Railroad Company, and Buckingham, the superintendent of transportation of the railroad companies, were indicted and convicted for combining to restrain interstate commerce by refusing to sell coal to and to transport coal for one Sharp unless he would discontinue an advertisement of sale of coal at a reduced rate. *Held*, there was no substantial evidence of any combination between any two of the defendants either to refuse to sell coal to Sharp or to refuse to transport it for him.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 31.]

**[788] MONOPOLIES (§§ 12, 20)—COMBINATION BETWEEN CORPORATION AND AGENT—CONSCIOUS PARTICIPATION OF TWO MINDS REQUISITE TO FORM.**—A combination between a corporation and its officer or agent in violation of the Anti-Trust Act (Act July 2, 1890, c. 647, § 1, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) cannot be formed by the thoughts or acts of the officer or agent alone, without the conscious participation in it of any other officer or agent of the corporation. The union of two or more persons, the conscious participation of two or more minds, is indispensable to an unlawful combination.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. §§ 12, 20.]

(Syllabus by the court.)

In Error to the District Court of the United States for the District of Utah.

The Union Pacific Coal Company, the Union Pacific Railroad Company, the Oregon Short Line Railroad Company, James M. Moore, and Everett Buckingham were convicted of a violation of Act July 2, 1890, and bring error. Reversed and remanded.

*C. S. Varian* and *N. H. Loomis* (*P. L. Williams*, on the brief), for plaintiffs in error.

*Hiram E. Booth*, U. S. Atty., and *William M. McCrea*, Asst. U. S. Atty.

Before *SANBORN* and *VAN DEVANTER*, Circuit Judges, and *WILLIAM H. MUNGER*, District Judge.

## Opinion of the Court.

**SANBORN, Circuit Judge.**

This writ of error challenges the legality of the conviction of the Union Pacific Coal Company, a corporation of Wyoming, engaged in mining coal in that state and selling it to retail dealers in Salt Lake City and elsewhere, James M. Moore, its general Western agent, the Union Pacific Railroad Company and the Oregon Short Line Railroad Company, corporations of Utah and common carriers, and Everett Buckingham, general superintendent of the transportation business of these carriers between Green River, in the state of Wyoming, and Salt Lake City, in the state of Utah, of a violation of the act of July 2, 1890, to protect trade and commerce against unlawful restraints and monopolies, commonly called the "Sherman Anti-Trust Act." 26 Stat. 209, c. 647 (U. S. Comp. St. 1901, p. 3200).

The charge in the indictment was that about July 20, 1906, the defendants below combined to force one Sharp, a purchaser of coal from the coal company and a retail dealer therein at Salt Lake City, out of his business, to control and maintain the retail price of coal in that city, and to prevent competition in the sale of coal at retail in Salt Lake City by failing and refusing to sell and to transport to him any of the coal mined by the coal company unless he would discontinue an advertisement he had caused to be inserted in the newspapers to the effect that he would sell storage coal at a reduction of 50 cents a ton from the regular retail price thereof then prevailing in Salt Lake City, and by the refusal of the coal company and Moore to sell to Sharp any [739] of its coal, and of the railroad companies and Buckingham to transport any coal for him ever after July 22, 1906.

Many specifications of error in the trial are urged upon our consideration; but the most serious is that at its close the court denied the motions of each of the defendants to instruct the jury to return a verdict against the government, because there was no substantial evidence of the alleged combination of any two of the defendants. It may not be unprofitable, before entering upon a review of the evidence challenged by this specification, to call to mind some of the indisputable rules of law by which it must be decided.

## Opinion of the Court.

The gist of the offense charged in the indictment was not the refusal of the coal company and Moore to sell coal on the purchaser's terms, or of the railroad companies and Buckingham to transport it. It was the combination so to do, and if there was no combination there was no offense. There was no law which forbade the coal company to prescribe the terms on which it would sell its product to Sharp, or to any other purchaser. There was no law which required the coal company to sell its coal to Sharp on the terms which he prescribed, or to sell it to him at all. It had the undoubted right to refuse to sell its coal at any price. It had the right to fix the prices and the terms on which it would sell it, to select its customers, to sell to some and to refuse to sell to others, to sell to some at one price and on one set of terms, and to sell to others at another price and on a different set of terms. There is nothing in the act of July 2, 1890, which deprived the coal company of any of these common rights of the owners and venders of merchandise, and if it did not combine with some other person or persons so to do its refusal to sell its coal to Sharp unless he would withdraw his advertisement of a reduction in his retail price of it was not the violation of the Sherman Anti-Trust Act charged in the indictment. *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173, 186, 8 Am. Rep. 159; *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, 460, 461, 463, 60 C. C. A. 290, 296, 297, 299, 64 L. R. A. 689; 1 Eddy on Combinations, § 292; *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 17 Sup. Ct. 427, 41 L. Ed. 832; *In re Greene* (C. C.) 52 Fed. 104, 115; *In re Grice* (C. C.) 79 Fed. 627, 644; *Walsh v. Dwight*, 40 App. Div. 513, 58 N. Y. Supp. 91, 93; *Brown v. Rounsavell*, 78 Ill. 589.

A corporation is a person, within the meaning of this act. It is another and different person from any of its stockholders, whether they are corporations or individuals; and no corporation can, by violating a law, make any one of its stockholders who does not himself participate in that violation criminally liable therefor.

The act of July 2, 1890, does not denounce every combination to engage in or to conduct commerce among the states

## Opinion of the Court.

or with foreign nations, but those combinations alone which restrain that commerce. It does not denounce every combination which restrains that commerce, but those combinations only, the necessary effect of which is to stifle, or directly and substantially to restrict, free competition in that commerce. *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 330, 339, 340, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Addyston Pipe & Steel [740] Co. v. United States*, 175 U. S. 211, 234, 20 Sup. Ct. 96, 44 L. Ed. 136; *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 576, 577, 19 Sup. Ct. 25, 43 L. Ed. 259; *United States v. Northern Securities Company* (C. C.) 120 Fed. 721, 722.

If the necessary effect of a combination to engage in or conduct interstate or international commerce is but incidentally and indirectly to restrict competition therein, while its chief result is to foster the trade and to increase the business of those who make and operate it, it does not fall under the ban of this law. *Hopkins v. United States*, 171 U. S. 573, 592, 19 Sup. Ct. 40, 43 L. Ed. 230; *Anderson v. United States*, 171 U. S. 604, 616, 19 Sup. Ct. 50, 43 L. Ed. 300; *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 245, 20 Sup. Ct. 96, 44 L. Ed. 136; *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, 458, 60 C. C. A. 290, 294, 64 L. R. A. 689, and cases there cited. There are lawful and unlawful combinations of persons conducting interstate and international commerce, and undoubtedly the former vastly outnumber the latter. There is no presumption that two or more persons who have combined to conduct interstate or international commerce are guilty of a combination in restraint of that commerce.

There was a legal presumption that each of the defendants was innocent until he was proved to be guilty beyond a reasonable doubt. The burden was upon the government to make this proof, and evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a ver-

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dict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction. *Vernon v. United States*, 146 Fed. 121, 123, 124, 76 C. C. A. 547, 549, 550; *United States v. Richards* (D. C.) 149 Fed. 443, 454; *Hayes v. United States* (C. C. A.) 169 Fed. 101, 103; *United States v. Hart* (D. C.) 78 Fed. 868, 873, affirmed in *Hart v. United States*, 84 Fed. 799, 28 C. C. A. 612; *United States v. M'Kensie* (D. C.) 35 Fed. 826, 827, 828; *United States v. Martin*, 26 Fed. Cas. 1183, 1184 (No. 15,731); *People v. Ward*, 105 Cal. 335, 341, 38 Pac. 945; *People v. Murray*, 41 Cal. 66, 67; *State v. Hunter*, 50 Kan. 302, 32 Pac. 37; *Bradshaw v. State*, 17 Neb. 147, 22 N. W. 361, 366.

We turn to an examination of the evidence in the light of these principles. The defendants naturally divide themselves into two groups, the railroad companies and Buckingham, and the coal company and Moore. There is no evidence that either of the railroad companies or Buckingham ever combined with any one to fail or to refuse, or ever failed or refused, to transport any coal or other merchandise which Sharp offered to any of them for transportation or requested any of them to carry, so that the only question regarding them is whether or not there was substantial evidence that any of them unlawfully combined with the coal company, or with Moore, its Western sales agent, to refuse to sell the product of the coal company to Sharp.

[741] There had been times in winter when the demand for coal in Salt Lake City had been so great that it was impossible for the coal companies and the railroad companies to supply it, and in the summer of 1906, for the purpose of getting as large a portion of the supply for the coming winter into the city in the summer as possible, so that the demand in the winter might not cause a coal famine, as it had done at other times, the coal companies arranged to sell coal which should remain stored with the retail dealers, or with their customers, on August 31, 1906, at a price 25 cents below the regular price for coal sold for general consumption, and the two railroad companies arranged to and did offer a rate of transportation from the mines in Wyoming to Salt Lake

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City for such stored coal 25 cents lower than the rate on coal sold for general consumption. It had long been, and then was, the practice of the railroad companies bringing coal into Salt Lake City from the mines to collect from the dealers in that city who purchased it both the purchase price of the coal and the freight, to pay over the purchase price to the coal companies which sold it, and to distribute the freight among the carriers that earned it. The reduction on storage coal was to be paid to the purchasers after August 31, 1906, upon proof that the coal remained in store on that day; but the purchasers were charged, and the railroad companies collected in the first instance, the regular price for coal sold for consumption upon all the coal they brought into the city for the coal companies. The reduction in the price was to be refunded after August 31, 1906, upon suitable proof.

The Union Pacific Coal Company had many competitors that were mining coal, selling it, and shipping it to dealers in Salt Lake City, among them four companies which were shipping coal into the city over the Union Pacific Railroad and the Oregon Short Line Railroad. The Union Pacific Railroad Company owned all the stock and a majority of the bonds of the coal company; but Buckingham and the other officers of that company, and of the Short Line Company, at Salt Lake City, bore no official relation to the coal company and they testified that they had no authority over its sales agent, Moore. The general manager of the coal company was one Clark, and his office was at Omaha. He was Moore's superior officer, and he had fixed the coal company's selling price of storage coal by written order. The regular retail price in Salt Lake City was \$5.25 per ton, and the retail dealers, including Sharp, had been and were selling all coal at that price, when on July 17, 1906, Sharp published a notice in the newspapers of the city that he would sell coal for storage at \$4.75 per ton. Gridley, the manager of another coal company which was shipping coal into the city and selling it, protested to Sharp and to Moore, and notified the latter that his company would reduce the retail price to \$4.25 per ton and keep it there all winter unless that advertisement was discontinued. On July 17 Moore

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asked Sharp to discontinue this advertisement, and told him that the coal company would not sell him any more coal unless he did so. Sharp refused so to do, and on July 18, 1906, Moore stopped shipments of coal to him from the mines of the coal company. On July 20, 1906, Sharp complained to Bancroft, the general manager of the two railroads which brought the coal to the [742] city, and the latter directed Buckingham, the superintendent of transportation, to investigate the matter. Buckingham called Moore, and talked the matter over with him and Sharp. The latter testified that he told Moore and Buckingham that he had had an understanding with some one other than Moore, who represented him in his absence, to the effect that he might advertise sales of storage coal at \$4.75 per ton, and that he would not take the advertisement out;

"that finally Mr. Buckingham asked what I was to do—no, Mr. Moore said—one of his arguments was that Mr. Gridley had threatened this extra 50 cents cut unless I was forced to take it out of the paper, and that they knew he would do it, and would stay with it—he had done it at some other point—and they all agreed that they could not stand anything of that sort, and that I would have to take it out. I refused to do it, and they wanted to know what I would do. I told them I would go out of business first. Q. What did Mr. Buckingham say to you?—A. That is what he said to me—asked me; that is one of the things. Q. What else did he say?—A. Then he said he was very sorry that I couldn't see it in their light. Q. What did he say about your getting coal in case you did not do as he asked?—A. They simply said, if I didn't take the advertisement out of the paper, I wouldn't get coal. Q. Who said that?—A. I think Mr. Buckingham. Q. Had Mr. Moore said anything about that before or after?—A. In this conversation? Q. Yes.—A. Yes, sir; practically the same thing."

He further testified that Buckingham "agreed with Moore that I could not get any more coal"; that he—

"told me I would have to take it out of the paper, and what would I do if I didn't get the coal. I told him I would go out of business first. He, Mr. Buckingham, told me he was awfully sorry that I could not come to their views—not his view; their view."

He testified that he never tried to get any coal after that, that he could not get any coal of the other coal companies, that he sold all the coal he had, and went out of business.



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He also testified that his understanding was that Moore did as Bancroft told him, that he had had it work that way, that when he could not get coal from Moore he complained to Bancroft and got it, that he thought Bancroft controlled the railroad deliveries, and that Moore had nothing to do with the railroads. And finally he testified in this way:

"Q. Mr. Bancroft is the general manager of the Oregon Short Line Railroad Company, and he has nothing to do with Mr. Moore has he?—A. Yes. Q. What?—A. What? Nothing official, except, if he asks Mr. Moore to do a thing, I think he will do it. Before he did it."

Moore testified that he stopped the sales to Sharp on July 18, 1906, because the latter would not withdraw his advertisement of the reduced price; that he did this without any understanding or agreement with Bancroft or Buckingham, or any other officer of either of the railroad companies, or any officer of the coal company, or anybody else; that at the meeting on July 20 he and Sharp stated their positions, and then Buckingham said to Sharp:

"I am just coming between you and Mr. Moore. I haven't anything to do with it, but I think you are in the wrong. If I were you I would get in line, and do business as other coal dealers do."

That neither he nor Buckingham told Sharp at that meeting that he could not get any more coal unless he took his advertisement out [743] of the papers; that he never made any agreement with Buckingham or any one, at or after the meeting of July 20, not to sell Sharp any more coal; that he heard, but did not know, that the Union Pacific Railroad Company owned and controlled the coal company, but that he did not mean by that that it owned or controlled it in any other way than by the ownership of the stock; that the business of the coal company in selling and shipping coal was entirely distinct from that of the railroad companies; that the railroad companies bought coal of the coal company and paid for it in the same way that they bought coal of other coal companies and paid them for it; that all the business of the coal company, except its sales, was in Wyoming; and that it had its own general manager and superintendent.

Buckingham testified that he had no control of or authority over Moore; that at the meeting of July 20 Sharp


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and Moore stated their positions, and Moore said Sharp's orders had been held up, and shipments would not be resumed until Sharp's advertisement was discontinued; and that he (Buckingham) told Sharp he could not do anything for him, and that he thought he was standing in his own light. He also testified that he never told Sharp that unless he took the advertisement out of the paper he could get no more coal, that the reason why he could do nothing for Sharp was that it was not a transportation matter and he had no authority, and that he thought it was understood that the Union Pacific Railroad Company controlled the coal company. Bancroft testified that he was the general manager of the Oregon Short Line Railroad Company and of the Union Pacific Railroad Company west of Green river, that he never had any jurisdiction or control of any of the officers of the coal company, that he took it that the Union Pacific Railroad Company controlled the coal company, and that he had no authority over Moore. There was no other evidence material to the issue whether or not the defendants were parties to an unlawful combination not to sell coal to Sharp.

What was there in any of this evidence inconsistent with the absence of such a combination by Buckingham and the railroad companies? The counsel for the government answer: (1) The fact that the storage rate and the reduction in the price of coal and of the freight charges were announced by joint circulars issued by the railroad companies; but this method of announcement was perfectly consistent with the independent action of the coal company, for the railroad companies collected the price of all the coal brought into the city for the coal companies, as well as the freight which the railroad companies earned. (2) The fact that the price of the coal and the freight were collected by the Oregon Short Line Company; but it had been for years, and then was, the custom for the terminal railroad company at Salt Lake City to collect the price of coal delivered for all the vendor companies, and it is hardly probable that all those companies had long been in a combination not to sell coal to Sharp. (3) The fact that both railroad companies were

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operated by the same set of officials, and that they paid to all dealers the agreed refund on coal held in storage on August 31, 1906; but there is nothing in this fact to indicate that they combined to stop the sale of coal by the coal company to Sharp, for they refunded [744] to him in the same way as to others. (4) The fact that by Bancroft's direction Buckingham investigated the disagreement between Moore and Sharp two days after the former had stopped selling and shipping coal to Sharp, and the statement of Sharp, which was contradicted by Moore and Buckingham, that the latter told Sharp that unless he took the advertisement out of the newspapers he would not get any more coal, and that he was awfully sorry he could not come to their view; but there is nothing in this investigation, or even in this statement, inconsistent with the theory that Buckingham and Bancroft had no authority to control or direct Moore's action, that Buckingham's investigation was inspired by the interest of the railroad companies in the freight they might earn, and that there was no combination between them and Moore relative to the latter's refusal to sell or ship coal to Sharp. (5) The fact that Sharp had sometimes applied to Bancroft for coal, and had secured it, when he could not get it of Moore; but that fact is consistent with the absence of any control over Moore in Bancroft, for the latter testified, and this testimony was not contradicted, that he did not know of a coal dealer in Salt Lake City that he had not caused the railroad companies to purchase coal for and to divert it to, when such dealer was short. (6) The fact that Bancroft, Buckingham, and Moore testified that they understood that the Union Pacific Railroad Company owned and controlled the coal company; but the evidence is undisputed that it owned the stock of the coal company. It did, therefore, own and control it in one sense, and there is no evidence that it owned or controlled it in any other way. There is no substantial evidence that either Bancroft or Buckingham had any authority or control over Moore or his sales, and a stockholder of a corporation does not become criminally liable for a combination made by the corporation without conscious participation therein.



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From this review of the evidence and of the argument of the counsel for the government, the fact appears that there was no substantial evidence in this case inconsistent with the innocence of Buckingham and the railroad companies, while there was plenary proof that they were not guilty; for the evidence is conclusive and undisputed that the coal company, through Moore, its agent, refused to sell coal to Sharp and stopped shipments to him two days before Bancroft, or Buckingham, or the railroad companies, knew it. They could not have combined to make that refusal and to prevent the sales of the coal after the refusal had been made and the prevention had been effected, and under the evidence they had no power to change the policy and course of the coal company and to compel it to sell coal to Sharp, save by a vote of its stock by the Union Pacific Company at a succeeding annual election for a board of directors that would pursue such a course. The motion to instruct the jury to return a verdict in favor of Buckingham and the railroad companies should have been granted.

There remain for consideration the coal company and Moore. For the reasons which have been stated, the evidence was insufficient to sustain a conviction of either of them of an unlawful combination with Buckingham or with either of the railroad companies. But counsel for the government argue that the testimony is sufficient to convict them of combining each with the other, and they cite *United States v. [745] MacAndrews & Forbes Co.* (C. C.) 149 Fed. 831, 832, in which an indictment of two corporations and their presidents for a combination in violation of the Anti-Trust Act was sustained against the officers, not on the ground that an unlawful combination of either of them with his corporation could be made by his act as an officer of the corporation without the assent or knowledge of any other officer or agent thereof, but on the ground that the corporation might have done some things and the individuals other things which were utterly different, and yet all these things might dovetail together and produce an unlawful combination; *People v. Detroit White Lead Works*, 82 Mich. 471, 46 N. W. 735, 737, 9 L. R. A. 722, a prosecution for creating and maintaining a nuisance; *Overland Cotton Mill Co. v.*

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*People*, 32 Colo. 263, 269, 75 Pac. 924, 105 Am. St. Rep. 74, a prosecution for employing a child under 12 years of age; *United States v. N. Y. Central & H. R. R. Co.* (C. C.) 146 Fed. 298, 301, and *N. Y. Central R. R. Co. v. United States*, 212 U. S. 481, 491, 497, 29 Sup. Ct. 304, 53 L. Ed. 613, a prosecution for giving rebates—cases in which corporations and their officers were convicted, not of any combination, but of violations of specific statutory prohibitions committed by the corporations and the individuals by means of the acts of the latter within the scope of their authority as agents or officers.

But no case has been called to our attention that sustains the position that an agent of a corporation may alone form an unlawful combination between himself and his corporation by his thoughts and acts within the scope of his agency, without the knowledge or participation of any other agent or officer of the corporation. If he may, the distinction between the commission of an offense and a combination to commit it by a corporation vanishes into thin air; for a corporation can act only by an agent, and every time an agent commits an offense within the scope of his authority under this theory the corporation necessarily combines with him to commit it. This cannot be, and it is not, the law. The union of two or more persons, the conscious participation in the scheme of two or more minds, is indispensable to an unlawful combination, and it cannot be created by the action of one man alone. The plan and the act of refusing to sell coal to Sharp unless he would withdraw his advertisement were the scheme and the act of Moore as the agent of the coal company, and of Moore alone. No other agent or officer of the coal company had any knowledge of it, or gave any assent to it, and consequently the scheme and the act failed to evidence an unlawful combination between the corporation and Moore, and the motion to instruct the jury to return a verdict in their favor should have been granted also.

The judgments below must be reversed, and the case must be remanded to the court below, with directions to set aside the verdict and to grant a new trial; and it is so ordered.

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[823] UNITED STATES *v.* KISSEL ET AL.\*

(Circuit Court, S. D. New York. October 26, 1909.)

[173 Fed. Rep., 823.]

**MONOPOLIES (§ 29)—ELEMENTS OF OFFENSE—ANTI-TRUST STATUTE.—**

To constitute the offense of conspiracy in restraint of interstate or foreign commerce, or to monopolize such commerce, under the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) unlike a conspiracy to commit an offense against or to defraud the United States, under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), no overt act is necessary; the conspiracy itself being the offense.<sup>b</sup>

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 19; Dec. Dig. § 29.]

**MONOPOLIES (§ 12)—ANTI-TRUST ACT—"CONSPIRACY."—**The word "conspiracy," as used in the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), has substantially the same meaning as the word "contract."

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

For other definitions, see Words and Phrases, vol. 2, pp. 1454-1461; vol. 8, p. 7613.]

**CRIMINAL LAW (§ 149)—CONSPIRACY IN VIOLATION OF ANTI-TRUST**

**LAW—LIMITATION OF CRIMINAL PROSECUTION.—**A conspiracy in restraint of interstate commerce, or to monopolize the same, in violation of the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), by causing a manufacturing corporation to suspend business in the interest of a competing concern, by obtaining control of its stock through a contract, was complete at latest when its object was fully accomplished by the making of the contract and the election of a board of directors who voted to cease business; and a prosecution therefor is barred in three years from that time, under Rev. St. § 1044 (U. S. Comp. St. 1901, p. 725).

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 273-275; Dec. Dig. § 149.]

**CRIMINAL LAW (§ 150)—CRIMINAL PROSECUTION—LIMITATION.—**If a conspiracy to commit a crime has been carried out, and the crime committed, those who committed it are subject to whatever penalties the law imposes, and entitled to whatever protection the law affords; and if [824] the statute of limitations is a bar to a prosecution for the crime, that bar cannot be lifted by a prosecution for a conspiracy to commit that crime.

\* For opinion of Supreme Court reversing judgment of Circuit Court dismissing the indictment (218 U. S., 601), see *post*, p. 816.

<sup>b</sup> Syllabus copyrighted, 1910, by West Publishing Company.

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[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 275; Dec. Dig. § 150.]

CRIMINAL LAW (§ 288)—SPECIAL PLEA OF LIMITATION.—The defense of the statute of limitations may be raised in a criminal case by a special plea before trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 660, 661; Dec. Dig. § 288.]

Gustav E. Kissel and Thomas B. Harned, indicted with the American Sugar Refining Company and others, filed pleas in bar to the indictment, to which the government demurred. Demurrers overruled, and pleas sustained.

*Henry A. Wise*, U. S. Atty. (*Charles F. Brown*, *John W. H. Crim*, and *James R. Knapp*, of counsel), for the United States.

*William D. Guthrie* and *William Church Osborn*, for defendant Kissel.

*George Whitefield Betts, Jr.*, and *Francis H. Kinnicutt*, for defendant Harned.

HOLT, District Judge.

These are demurrers filed by the government to pleas in bar interposed by the defendants Kissel and Harned to the indictment. The indictment charges the defendants with a conspiracy in restraint of interstate commerce, in violation of Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), commonly called the "Sherman Act." The defendants are the American Sugar Refining Company and its directors, and certain other persons. The indictment alleges, in substance, that the defendants conspired to prevent the Pennsylvania Sugar Refining Company from doing business. It is alleged that this result was accomplished; that the defendant Kissel, acting secretly as agent of the American Sugar Refining Company, made a contract to loan to Adolph Segal \$1,250,000, upon a note of Segal secured by certain collateral, among which collateral were 26,000 shares, being a majority, of the stock of the Pennsylvania Sugar Refining Company; that, having thus obtained such ma-

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jority of the stock, a new board of directors, in the interest of the American Sugar Refining Company, was elected; that said board immediately voted to close the refinery of the Pennsylvania Sugar Refining Company; and that it has since done no business. The defendants Kissel and Harned have pleaded, in bar of the prosecution, the statute of limitations; and the defendant Kissel has also pleaded in bar that, having produced on the trial of a civil action certain documents tending to prove certain facts necessary to be proved in this case, he is entitled to immunity from prosecution under this indictment.

Admittedly, the general three-year statute of limitations for crimes not capital contained in section 1044 of the United States Revised Statutes (U. S. Comp. St. 1901, p. 725), applies in this case. It is also conceded that the execution of the contract between Kissel and Segal, by which the loan was made and the control of a majority of the stock of the Pennsylvania Company obtained, the consent of the Champion [825] Construction Company to the pledge of the stock, the power of attorney by that company to Kissel, the election of the new directors, the meeting of the new board, at which the vote was passed that the Pennsylvania Sugar Refining Company should thereafter refrain from carrying on business until the further order of said board, the advance of \$1,250,000 by the American Sugar Refining Company to Kissel, and the loan of that amount by Kissel to Segal, were all done and the entire transaction closed in all respects on or before January 4, 1903. Therefore the offense alleged in this indictment was complete, and this indictment might have been brought, on January 5, 1904. The indictment was not filed until July 1, 1909, more than five years after the time when the alleged conspiracy was entered into and its object entirely accomplished. Obviously, therefore, the statute of limitations is a bar to this prosecution, unless the crime charged in the indictment is a continuing offense, or acts have occurred which have renewed the offense and started again the running of the statute.

A conspiracy, in its legal sense, is a misdemeanor at common law. It has been defined as an agreement by two or more persons to do an illegal act, or to do a legal act by



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illegal methods. Such a conspiracy, if entered into, could be criminally punished at common law, whether any act in furtherance of it was done or not. Section 5440 of the United States Revised Statutes (U. S. Comp. St. 1901, p. 3676) provides that if two or more persons conspire either to commit any offense against the United States, or to defraud the United States, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to criminal punishment. Under this statute, a mere conspiracy is not an offense; but, in addition to the conspiracy, one or more of the parties to it must do some act to effect its object before a criminal prosecution can be maintained. The first section of the Sherman Act provides that:

"Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor."

The second section of the act provides that:

"Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor."

This indictment is necessarily brought under these provisions of the Sherman Act. No indictment can be brought in the United States courts for the offense of conspiracy at common law, because it has not been made an offense by any United States statute. Nor could this indictment have been brought under section 5440 of the United States Revised Statutes, because there is no law of the United States making a conspiracy in restraint of trade or to monopolize trade an offense against the United States except the Sherman Act, and there cannot be a conspiracy to engage in a conspiracy. Under the Sherman Act no overt act is necessary to the commission of the offense. That provides [826] that every person who engages in a conspiracy in restraint of trade or commerce, or to monopolize trade, is guilty of the offense. The question in this case, therefore, is when the statute of

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limitations begins to run in an indictment for conspiracy under the Sherman Act.

The law of conspiracy has been the subject of a great deal of overrefined discussion, and the authorities upon the subject are quite conflicting. Some hold a conspiracy to be an offense complete when entered into, and upon which the statute of limitations immediately begins to run. Others hold it to be a continuing offense, from which it is argued that the statute of limitations never begins to run against a conspiracy until it is abandoned and whatever result has been accomplished by it annulled. The government's counsel, upon the argument, claimed that the defendants, having once entered upon the conspiracy and closed the refinery of the Pennsylvania Company, continued to be engaged in the conspiracy every day so long as the refinery was closed. It would follow, from this position, that the only way in which the defendants could start the statute of limitations running would be to rescind the vote to close the refinery, have the directors friendly to the American Sugar Company resign, and deliver back to the original holders the stock taken as collateral. No authorities have been cited sustaining such a position. Most of the cases cited have arisen in prosecutions based upon section 5440, under which the indictment must not only charge the conspiracy, but one or more overt acts.

Some authorities hold that the statute of limitations begins to run in such prosecutions as soon as one overt act has been committed, and that, if more acts in furtherance of the conspiracy are performed, that does not stop the running of the statute. *United States v. Owen* (D. C.) 32 Fed. 534; *United States v. McCord* (D. C.) 72 Fed. 159; *Ex parte Black* (D. C.) 147 Fed. 832; *United States v. Biggs* (D. C.) 157 Fed. 264. Other cases hold, in substance, that each additional overt act starts the statute running anew. *United States v. Bradford* (C. C.) 148 Fed. 413; *Ware v. United States*, 154 Fed. 577, 84 C. C. A. 503, 12 L. R. A. (N. S.) 1053; *United States v. Brace* (D. C.) 149 Fed. 874. In *Ware v. United States*, 154 Fed. 577, 84 C. C. A. 503, 12 L. R. A. (N. S.) 1053, it is held that there cannot be a con-

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viction upon the original conspiracy and overt acts which have taken place more than three years before the finding of the indictment; that there must be proved a conspiracy within the three years, as well as an overt act; and that, although the original conspiracy is competent evidence upon the question whether a new or continuing conspiracy has been entered into within the three years, it alone is insufficient to prove such new conspiracy. See, also, *United States v. Black*, 160 Fed. 431, 87 C. C. A. 383.

These decisions were all made in other districts. With entire respect for the judges making them, it is impossible to harmonize them. In my opinion, the cases which hold that the statute begins to run after the first overt act, and is not stopped by subsequent overt acts in pursuance of the same conspiracy take the correct view. But in any event the decisions under section 5440 of the United States Revised Statutes are not strictly applicable to this prosecution.

[827] The word "conspiracy" is usually employed with a sinister meaning; but, in my opinion, as used in the Sherman Act, it has substantially the same meaning as the word "contract." A conspiracy in restraint of trade is nothing but a contract or agreement between two or more persons in restraint of trade. If this indictment had charged, in the language of the act, that the defendants had made a contract in restraint of trade, I suppose no one would claim that the statute of limitations did not begin to run upon the execution of the contract. How can the government impose a different liability on the defendants by calling the same thing a conspiracy? I think that the offense was complete in this case when the contract between Kissel and Segal was made. It was unquestionably complete before January 5, 1904, before which date the contract was carried out in all respects and the object of the alleged conspiracy accomplished. If, however, the doctrine of that class of cases which hold that each new overt act constitutes a new offense, in prosecutions under section 5440, were to be followed in this case, the overt acts alleged to have occurred within three years, necessary to constitute a new offense, must be acts which have a tendency to carry out the object of the con-

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spiracy, or in some way tend to make it effectual (*United States v. McLaughlin* [D. C.] 169 Fed. 307; *United States v. Black*, 160 Fed. 431, 87 C. C. A. 383); and each defendant must have participated intentionally in an overt act done within the three years prior to the indictment (*Ware v. United States*, 154 Fed. 579, 84 C. C. A. 503, 12 L. R. A. [N. S.] 1053).

So far as the defendant Harned is concerned, he had nothing to do with any overt act alleged in the indictment after December 30, 1903. As to the defendant Kissel, the overt acts alleged in the indictment as occurring within three years before it was filed, in my opinion, are not acts which had any tendency to carry out the object of the conspiracy, or to make it effectual. The overt acts so alleged are certain resolutions adopted by the directors of the American Sugar Refining Company, agreeing to indemnify the president and counsel for any liability in the Segal matter, certain letters written by one of the defendants to the secretary of the American Sugar Refining Company, and a bill for disbursements rendered by the defendant Kissel to the American Sugar Refining Company, all in the year 1907. In my opinion, these alleged overt acts had no tendency to accomplish the object of the conspiracy. The object was completely accomplished before January 5, 1904. One of the letters, dated February 15, 1907, alleged in the indictment as an overt act, shows that the question whether criminal proceedings should be brought had been under consideration by the Department of Justice before that time, but it took no action until this indictment was filed.

The case of *United States v. Irvine*, 98 U. S. 450, 25 L. Ed. 193, although that was not a prosecution for a conspiracy, seems to me to state the principle applicable to such a case better than any other authority that has been cited. In that case an indictment was found for a violation of the act making it a misdemeanor for a pension agent to wrongfully withhold from a pensioner the whole or any part of the pension due to him. The indictment was brought more than three [828] years after the pension money had been received by the pension agent and demanded from him by

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the pensioner. The trial court held that the offense prohibited by the statute was a continuing offense, and that so long as the defendant continued to withhold the pension money the offense was not barred by the statute of limitations. The Supreme Court overruled that decision. Mr. Justice Miller, in the opinion, says:

"There is in this but one offense. When it is committed, the party is guilty, and is subject to criminal prosecution; and from that time, also, the statute of limitations applicable to the offense begins to run. It is unreasonable to hold that 20 years after this he can be indicted for wrongfully withholding the money, and be put to prove his innocence after his receipt is lost, and when perhaps the pensioner is dead. \* \* \* He pleads the statute, \* \* \* which was made for such a case as this; but the reply is: 'You received the money. You have continued to withhold it these 20 years. Every year, every month, every day, was a withholding within the meaning of the statute.' We do not so construe the act. Whenever the act or series of acts necessary to constitute a criminal withholding of the money have transpired, the crime is complete, and from that day the statute of limitations begins to run against the prosecution."

There seems to be an increasing tendency in recent years for public prosecutors to indict for conspiracies when crimes have been committed. A conspiracy to commit a crime may be a sufficiently serious offense to be properly punished; but, when a crime has been actually committed by two or more persons, there is usually no proper reason why they should be indicted for the agreement to commit the crime, instead of for the crime itself. A large class of federal prosecutions for commercial offenses, such, for instance, as violations of the interstate commerce act, the Sherman Act, the bankrupt act, the acts relating to public lands, and many others, now habitually take the form of indictment for conspiracies to commit crimes, the actual commission of which is also usually alleged in the indictment. Prosecutors seem to think that by this practice all statutes of limitations and many of the rules of evidence established for the protection of persons charged with crime can be disregarded. But there is no mysterious potency in the word "conspiracy." If a conspiracy to commit a crime has been carried out, and the crime committed, the crime, in my opinion, cannot be made something else by being called a conspiracy. The men who have

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committed the crime are liable to whatever penalties the law imposes and to whatever protection the law affords. If the statute of limitations is a bar to a prosecution for the crime, that bar, in my opinion, cannot be lifted by a prosecution for a conspiracy to commit that crime.

Statutes of limitations are beneficial statutes. The interests of the community and justice to persons charged with crime require that offenses be promptly prosecuted. Statutes of limitations should be given a plain and sensible construction. Their effect should not be frittered away by a strained interpretation, based on subtle and refined reasoning. The government has waited before bringing this prosecution for five and a half years after the alleged offense was complete, and, in my opinion, the statute of limitations is a bar to this indictment.

This conclusion makes it unnecessary to consider the doubtful question raised by the plea of immunity interposed by the defendant Kissel.

[829] The ground of demurrer that the plea in bar of the statute of limitations will not lie, because the plea is in substance a plea of not guilty, seems to me, if I correctly understand it, wholly untenable. The defense of the statute of limitations could be raised on the trial under the general plea of not guilty; but it can also be raised by a special plea before the trial.

The demurrers to the pleas in bar interposed by the defendants Kissel and Harned are overruled, and judgment dismissing the indictment as to said defendants may be entered.

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**[899] ARKANSAS BROKERAGE CO. ET AL. v.  
DUNN & POWELL, INC.\***

(Circuit Court of Appeals, Eighth Circuit. October 25, 1909.)

[173 Fed. Rep., 899.]

**MONOPOLIES (§ 17)—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE—COMBINATION PROHIBITED.**—The organization by a number of mercantile jobbers located in the same city of a brokerage company, of which they owned the stock, and the purchase of merchandise re-

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\* Rehearing denied December 4, 1909.

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quired by them from manufacturers and jobbers in other states through such company, instead of through other brokers previously patronized, although there was no agreement binding them to do so, and the use of their influence to extend its business, did not constitute a combination or conspiracy in restraint of interstate trade or commerce, or to monopolize the same, in violation of the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), but was a legitimate and lawful business enterprise.\*

[Ed. Note.—For other cases see Monopolies, Dec. Dig. § 17.]

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

Action by Dunn & Powell, Incorporated, against the Arkansas Brokerage Company and others. Judgment for plaintiff, and defendants bring error. Reversed.

*Charles T. Coleman and W. T. Wooldridge (Frank G. Bridges, N. J. Gantt, Jr., George W. Murphy, and W. M. Lewis, on the brief), for plaintiffs in error.*

*J. W. House (M. House, on the brief), for defendant in error.*

Before ADAMS, Circuit Judge, and RINER and AMIDON, District Judges.

ADAMS, Circuit Judge.

This was an action at law to enforce liability for three-fold damages created by the seventh section of the Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]). Dunn & Powell, a corporation engaged in the merchandise brokerage and commission business, with its chief office in Little Rock and a branch office in Pine Bluff, Ark., charged the defendants the Arkansas Brokerage Company and five other domestic corporations doing business in Pine Bluff, together with two foreign corporations doing business in other states, with entering into a combination and conspiracy in restraint of trade and commerce among the states, and with monopolizing such trade

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and commerce, in violation of sections 1 and 2 of that act, and thereby injuring the plaintiff's business. The facts disclosed by the pleadings and proof are substantially these:

Plaintiff had been for many years prior to 1906 conducting a lucrative brokerage business in Pine Bluff, by negotiating sales of merchandise between manufacturers and wholesale dealers of other states and jobbers doing business in that region, and had built up in its branch office at that place a profitable business. In the year 1906 the five domestic corporations, constituting substantially all the jobbers in Pine Bluff, concluded to organize and did organize a corporation to do their own brokerage business, as well as that of any others which it might [900] secure. Each of them took and paid for two shares of its capital stock, which they caused to be issued to one of their officers or members as their representatives, and this constituted all of its stock, excepting two shares, which were sold to one Russell, who was chosen to be manager of the new corporation. Practically speaking, therefore, the wholesale business houses of Pine Bluff organized, owned, and operated the new corporation, which was named the Arkansas Brokerage Company, the main defendant herein. The other defendants were the five domestic corporations and two manufacturing corporations of other states, all of whom were alleged to be parties with the new brokerage company to the combination and conspiracy. While there was no agreement or understanding that the defendants the Pine Bluff jobbers should cease dealing with the plaintiff, they naturally enough preferred to deal and did deal with the brokerage company after its organization, and gave preference to it in the conduct of their business. There is evidence that those jobbers would not purchase through the plaintiff's agency, unless it would quote prices sufficiently low to neutralize the advantages they would secure by making their purchases through their own agency. The fact also appears that some foreign manufacturers, deciding that their business interests would be better served thereby, ceased to employ plaintiff, and voluntarily placed their accounts with the brokerage company. There was such a failure, however, to connect the foreign corporations which were made defendants to this suit in any improper, unfair,



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or unlawful way with the other and main defendants that the court at the close of the case directed a verdict in their favor, and no complaint is made of that action by the plaintiff.

While the bill of complaint and argument of plaintiff's counsel abound in repeated and diversely stated charges of confederacy, conspiracy, and unlawful contrivances to bring about the destruction of plaintiff's business and to appropriate it by the defendants, the proof, as we gather it from a patient and careful reading of the record, discloses but few actual and material facts. The five jobbers undoubtedly conceived a purpose to save the brokerage charges, which they had before then been required to pay, by negotiating their purchases through their own agency, and at the same time inaugurate and conduct another branch of business. By reason of their advantageous situation as jobbers who furnished a large part of the brokerage business of Pine Bluff, and by dint of business sagacity and industry, their new brokerage company was able to outstrip most of its competitors, including the plaintiff, and as a result the latter soon abandoned its branch office in Pine Bluff and ceased doing business there. There is little, if any, competent evidence of unfair competition by the brokerage company, unless it be in the fact that it secured the trade of its own stockholders and availed itself of their valuable influence for the extension and success of its business. To pronounce such action unfair and unlawful would disrupt many existing business corporations and effectually prevent the organization of any more. It would contravene one, if not the chief, reason for their creation or existence.

The contention of the plaintiff is therefore reduced to this: That the defendant jobbers wronged the plaintiff by arranging to do for [901] themselves what they had formerly employed it to do for them, and that the brokerage company wronged the plaintiff by availing itself of all its opportunities and favorable conditions for successful competition in a branch of business legitimately open to all comers. We agree fully with certain propositions of law urged by plaintiff's learned counsel in support of their contentions in this case, namely: (1) That the Anti-Trust Act denounces as il-

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legal any contract, combination, or conspiracy of whatever form or nature which directly or necessarily operates to restrain or obstruct the free flow of commerce between the states, and that this denunciation includes contracts, combinations, or conspiracies to restrain the liberty of a trader in such commerce to engage or continue therein. *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, and cases cited. (2) That any such contract, combination, or conspiracy which directly restrains the purchase, sale, or exchange of manufactured commodities among the several states is illegal. *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136. (3) That the destruction, restriction, or stifling of free competition in trade and commerce among the states constitutes a restraint of that trade, and is within the inhibition of the statute. *Northern Securities Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679. (4) That a broker, acting for individuals or firms doing business in one state, when soliciting or taking orders for the sale and delivery of their merchandise to jobbers or dealers located in other states, is in so doing engaged in interstate commerce. *Robbins v. Shelby Taxing District*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. Ed. 368.

But it is not perceived how the principles so invoked apply to the facts of this case or control its decision. The organization of the brokerage company as a competitor in business open to all had no natural tendency to directly or necessarily restrain commerce between the states, and the proof fails to show that it actually did restrain, lessen, or in any way stifle its free flow. The volume of that commerce, after as well as before the organization of the brokerage company, was determined by the fixed economic laws of demand and supply. The whole field was open to competition, and while the plaintiff, whose chief place of business was elsewhere, and one other broker in Pine Bluff, soon abandoned it, others operating there and in that vicinity remained in active competition, and without doubt all together were able and zealously disposed to keep the wheels of commerce as active as

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the demand for foreign merchandise required. Any one who had been in the business before could remain in it, and any one who wished to enter it afterwards could freely do so; but they had necessarily to compete with others, including the brokerage company, with whatever advantages they possessed for conducting a prosperous business. The fortuitous circumstance that the brokerage company had five important jobbers in the city so situated as to give it a preference arose from strictly legitimate relations. No one can deny that the jobbers had a right to organize a corporation to do their own brokerage business, as well as that of others. The law gave them that right, and they availed themselves of its provisions for that purpose. It cannot be doubted that [902] the five jobbers could have given their brokerage business to any broker on terms to be agreed upon, and it seems equally clear that by participating in the organization and ownership of the brokerage company they did no more than this, if indeed as much; for there was no obligation, express or implied, requiring them to deal with the brokerage company, except and so far only as their best interests from time to time dictated.

The mere fact that the broker, while engaged in negotiating sales of merchandise between an owner in one state and a jobber or consumer in another, is engaged in a species of interstate commerce, is quite unimportant, provided the business be done in a lawful manner. It becomes unlawful only when it is so done as to directly and substantially restrain that commerce or stifle its free flow. The proof, in our opinion, affords no warrant for a finding that any such consequences actually flowed, or had a natural tendency to flow, from the organization complained of in this case. The principles announced in the two cases of *Hopkins v. United States*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290, and *Anderson v. United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43, L. Ed. 300, fully sustain the conclusions we have reached in this case. In the latter case the court said:

"It has already been stated, in the *Hopkins* case above mentioned, that in order to come within the provisions of the statute the direct effect of an agreement or combination must be in restraint of that trade or commerce which is among the several states or with foreign

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nations. Where the subject-matter of the agreement does not directly relate to, act upon, and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object."

In *Field v. Barber Asphalt Co.*, 194 U. S. 618, 24 Sup. Ct. 784, 48 L. Ed. 1142, the court said:

"In this day of multiplied means of intercourse between the states, there is scarcely any contract which cannot in a limited or a remote degree be said to affect interstate commerce. But it is only direct interference with the freedom of such commerce that brings the case within the exclusive domain of federal legislation."

This court, in *Phillips v. Iola Portland Cement Co.*, 125 Fed. 593, 61 C. C. A. 19, said:

"This act of Congress [Anti-Trust Act] must have a reasonable construction. It was not its purpose to prohibit or to render illegal the ordinary contracts or combinations of manufacturers, merchants, and traders, or the usual devices to which they resort to promote the success of their business to enhance their trade, and to make their occupations gainful, so long as those combinations and devices do not necessarily have a direct and substantial effect to restrict competition in commerce among the states."

See, also, *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689.

From these cases, and many others to which attention might be called, it seems clear that the Pine Bluff jobbers merely resorted to a common [903] expedient, recognized by law and sanctioned by practice, of forming a subsidiary corporation to promote economy in the management of their existing business and to extend it into other fields of legitimate enterprise. If the new expedient affected interstate commerce at all, it was not in that direct, immediate, or necessary way which alone would make it obnoxious to the law, but only in an indirect, incidental, and unimportant way not within the denunciation of the law. The worst that

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can be said is that the parties availed themselves of certain advantages and opportunities which their relation to the brokerage business gave them and which materially aided them in the race of competition. If this resulted in injury to the plaintiff, it was *damnum absque injuria*. Free competition is the life of trade and commerce, and it is quite as important to approve all lawful, fair, and reasonable expedients devised to promote individual success as it is to condemn vicious and unlawful practices which violate individual right and the public weal.

The learned trial judge should have given the requested instruction to the jury that plaintiff was not entitled to recover. The judgment is therefore reversed, and the cause remanded to the Circuit Court for a new trial in harmony with the views here announced.

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[786] NORTHWESTERN CONSOL. MILLING CO. v.  
WILLIAM CALLAM & SON.

(Circuit Court, E. D. Michigan, N. D. February 1, 1910.)

[177 Fed. Rep., 786.]

**COURTS (§ 343)—PRACTICE IN FEDERAL COURTS—DEATH OF DEFENDANT—ABATEMENT OF ACTION FOR INFRINGEMENT OF TRADE-MARK.**—Where a suit for infringement of a trade-mark was instituted against two defendants, such infringement constituted a tort for which both were liable, so that on the death of one the suit did not abate as to the other, and under Rev. St. § 956 (U. S. Comp. St. 1901, p. 697), providing that if there are two or more plaintiffs or defendants in a suit where the cause of action survives to the surviving plaintiff or against the surviving defendant, and one or more of them dies, the right to action shall not abate, but shall be proceeded with by the surviving plaintiff against the surviving defendant.\*

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 915, 916; Dec. Dig. § 343.]

**MONOPOLIES (§ 20)—SHERMAN ACT—CONSOLIDATION OF CORPORATIONS.**—Sherman Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), prohibiting trusts and monopolies, does not condemn the purchase by three corporations of two insolvent corporations

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engaged in the same business, nor in the conduct of the business thereafter by the three purchasers, especially in an effort to liquidate the indebtedness.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 20.]

**MONOPOLIES (§ 10)**—**SHERMAN ACT**—**VIOLATION**—**EFFECT**.—Sherman Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), prohibiting a monopoly, provides its own penalties for the violations of its provisions, and does not deprive the offender of redress for a civil injury.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 9; Dec. Dig. § 10.]

**TRADE-MARKS AND TRADE-NAMES (§ 70)**—**INFRINGEMENT**—**UNLAWFUL COMPETITION**.—Complainant in 1891 adopted and commenced to use the word "Ceresota" as a trade-mark for its best grade of flour made from spring wheat, and built up a large trade therefor in Michigan and the other states, having expended \$500,000 in advertising. Complainant's trade-mark was registered on October 31, 1905, and in September, 1906, defendants, who operated a flour-mill in Michigan, began to use the word "Certosa" as a [787] trade-mark for flour which they falsely represented to be made from Minnesota and Turkey wheat, when in fact it was made from winter wheat, which makes an inferior flour. Defendants applied for registration of the word "Certosa" as a trade-mark which was denied, but, notwithstanding this, used the word in competition with plaintiff in the sale of flour in interstate commerce. *Held*, that defendants' acts constituted unlawful competition, and an infringement of complainant's trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.]

In Equity. Bill by the Northwestern Consolidated Milling Company against William Callam & Son for infringement of trade-mark. Decree for complainant.

*P. H. Gunckel*, for complainant.

*Beach, O'Keefe and Rockwith*, for defendants.

SWAN, District Judge.

Complainant is a corporation organized under the laws of Minnesota, and engaged in the manufacture of wheat flour in its several mills at Minneapolis in that state. In 1891 it adopted and commenced the use of the word "Ceresota" as a trade-mark for its best grade of flour of its manufacture.

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and has since that time continuously and extensively used that mark to indicate its product, and alleges that because of the high quality of the flour so made and marked, and by extensive advertisement of their product as "Ceresota" flour, has built up a large trade therefor, by that name, having expended in advertising about \$500,000; that under the name "Ceresota" that flour is dealt in and known both in foreign countries and in nearly all of the states of the Union, and that complainant has for many years had a profitable and steady trade in that flour in Michigan; that its aggregate sales under that trade-mark up to the time of this suit aggregate about 16,000,000 barrels; that in Michigan its sales from 1895 to 1907 aggregate about 350,000 barrels, and from 1897 to the fall of 1906 were about 125,000 barrels. Complainant's trade-mark was registered under the act of Congress on October 31, 1905.

The defendants operate a flour-mill in Saginaw known as the "Star Mill." About September, 1906, they began the use of the word "Certosa" as a trade-mark for flour of their manufacture, and have since used that trade-mark or brand continuously, and sold flour thereunder in Saginaw and elsewhere in Michigan. Defendants admit the ownership and operation of the Star Mills at Saginaw for the last 15 years; that prior to May 19, 1907, the mill was operated by both defendants, but was owned solely by defendant William Callam, who died May 19, 1908. He devised the mill property to his son Frank, the co-defendant herein. Defendants allege that:

"In May, 1906, they adopted the word 'Certosa' as a trade-mark for one of its best grades of flour; that defendant Frank Callam found the word 'Certosa' in an article of the Christmas 1906 number of Truth; that it is an historical Italian name for the monasteries of the Carthusian Order. One of the oldest monasteries at Florence, Italy, is known as the monastery of Certosa. That Callam believed this word singularly appropriate for the [788] firm's best brand of flour because of the fact that the monks of this monastery lived almost exclusively on a cereal diet."

These are substantially the facts pleaded by the parties. Both parties pack their products for market largely in cotton or paper bags on which their respective trade-marks or brands "Ceresota" and "Certosa" are printed in large

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capital letters diametrically across a circular design. The complainant's flour sold at \$2 per sack. Defendants advertised and sold their product at \$1.50 per sack.

A preliminary question is made by defendants upon the death of William Callam, it being claimed that thereby the suit abated. The record shows that the defendants were partners in the milling business, and that Frank from 1893 to 1907 had the entire control and management of the business, and selected and applied the mark "Certosa" to defendants' flour. The infringements alleged are torts, for which both defendants are liable. Section 956, Rev. St. U. S. (U. S. Comp. St. 1901, p. 697), declares that in such case the action shall not abate. *Patton v. Brady*, 184 U. S. 608, 22 Sup. Ct. 493, 46 L. Ed. 713; *In re Connavay, Rec'r.*, 178 U. S. 435, 20 Sup. Ct. 951, 44 L. Ed. 1134; *Estes v. Worthington* (C. C.) 30 Fed. 465.

Defendants' petition for leave to amend the answer by pleading that complainant was organized and is operating in violation of Sherman Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), and contrary to the laws of Michigan and the common law has no merit. Defendant, referring to the proofs (Brief, p. 64) that complainant consolidated five different plants, two of which were insolvent and were bought out by the other three, and that all of these corporations carried on business for years after that time, and that all of the corporations are now in existence trying to liquidate their indebtedness, admits (page 70 of his brief):

"The combination represented by complainant is not illegal in any other sense, except that the law will not lend its aid to the accomplishment of its purpose."

Under *Davis v. A. Booth & Company*, 131 Fed. 31, 37, 65 C. C. A. 269, there is nothing in the Sherman Act to condemn the purchase by three corporations of the two insolvent companies nor in the conduct of business thereafter by the three purchasers especially in their efforts to liquidate the indebtedness—apparently a consolidation to that end. Further, the matters referred to in the petition of defendants have no relevancy here. The Sherman Act has its own penalties for violations of any of its provisions. It contains



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nothing that sanctions the argument that an offender against it shall be deprived of redress for a civil injury on the plea that he has been guilty of an infraction of that act which gives a remedy to one injured in his business or property against the transgression of the law, and does not suggest that one who has taken the property, infringed the trade-mark or patent of another, or refused to pay debts because of an alleged transgression of the Sherman Act by the creditors, can invoke that act as a defense to liability either in suits in tort or contract *Independent Baking Powder Co. v. Boorman* (C. C. 130 Fed. 726; *Connolly v. Union Pipe Co.*, 184 U. S. 540; 22 Sup. Ct. 431, 46 L. Ed. 679.

[789] The proofs further show that the defendants are guilty of unfair competition, in passing off through their agents and employes defendants' product labeled "Certosa" as and for "Ceresota" flour, in misrepresentation as to the place of manufacture of their flour as labeled, the grade or quality thereof, and that it was made from Minnesota and Turkey wheat when it was not so in fact, and also in selling and offering their "Certosa" flour as spring wheat flour, which sells at a higher price than flour made from winter wheat.

Defendants also have infringed complainant's registered trade-mark. In defendants' application for registration of "Certosa" as a trade-mark, which was denied by the Patent Office, defendants made oath August 2, 1906, that they used that brand "in commerce among the several states," and made a like admission in their answer.

Complainant is entitled to a decree protecting it against the use of the word "Certosa" as a name for defendants' flour, because the use thereof for that purpose infringes complainant's trade-mark right both at common law and under the act of Congress providing for registration of trade-marks; that defendants have been guilty of unfair competition to the injury of complainant's business and rights. Complainant is also entitled to a perpetual injunction as prayed, and an accounting of damages and profits with respect to both trade-mark infringement and unfair competition, with costs to be taxed.

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**[104] MOTION PICTURE PATENTS CO. v. LAEMMLE  
ET AL.****SAME v. PANTOGRAPH CO.**

(Circuit Court, S. D. New York. March 7, 1910.)

[178 Fed. Rep., 104.]

**PATENTS (§ 297)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION—PREVIOUS ADJUDICATION.**—Where the validity of a patent has been adjudicated by the Circuit Court of Appeals, and infringement is conceded, a preliminary injunction should issue against defendants, unless the court is convinced of the probability that, had the new evidence been before the Circuit Court of Appeals, its conclusion would have been different, or a claim by defendant that complainant is without title is sustained.\*

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 488; Dec. Dig. § 297.]

Effect of prior adjudication as to validity of patent in Circuit Court of Appeals, see notes to *National Cash Register Co. v. American Cash Register Co.*, 8 C. C. A. 565; *Thomson, Houston Electric Co. v. Hoosick Ry. Co.*, 27 C. C. A. 427; *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 475.]

**MONOPOLIES (§ 21)—COMBINATIONS IN RESTRAINT OF TRADE—DEFENSE TO SUIT FOR INFRINGEMENT OF PATENT.**—That a complainant is itself, or is a member of, a combination in violation of the federal anti-trust statute, is not a defense available in an action for the infringement of a patent, nor does it show a defect in complainant's title.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 15; Dec. Dig. § 21; Patents, Cent. Dig. §§ 451, 489.]

In Equity. Suits by the Motion Picture Patents Company against Carl Laemmle and the Independent Moving Pictures Company of America and against the Pantograph Company, respectively. On motions for preliminary injunctions. Granted in part.

*Richard N. Dyer*, for complainant in first suit.

*Philip Farnsworth*, for complainant in second suit.

*Emerson R. Newell*, for defendants.

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NOYES, Circuit Judge.

The validity of the patent in suit has been adjudicated by the Circuit Court of Appeals for this circuit (*Edison v. American Mutoscope & Biograph Co.*, 151 Fed. 767, 81 C. C. A. 391), and infringement on the part of the defendant corporations is conceded. Consequently a preliminary injunction should issue, unless this court is convinced (1) of the probability that, had the evidence of new disclosures and uses been before the Circuit Court of Appeals, its conclusion would have been different; or (2) that the complainant is without title to the patent.

The evidence concerning the Levison disclosure and the Greene patent or invention is, however, insufficient to convince me that, had it been introduced in the former case, a different conclusion would probably have been reached. I am also of the opinion that the charge, if established, that the complainant is itself, or is a member of, a combination in violation of the federal Anti-Trust statute, is not a defense available in an action for the infringement of a patent, and fails to show a defect in the complainant's title.

An injunction against the corporation defendants may therefore issue. The proof of personal infringement by the defendant Laemmle is, however, deemed insufficient to warrant the issuance of an injunction against him, and it is denied. But this action is without prejudice to the right of the complainant to renew its application, in case future acts of personal infringement are disclosed.

This case seems to be fully presented upon the affidavits, and it is assumed that the complainant will desire to appeal from this order to the court which, in view of its previous decision, can best pass upon the matter. Such an appeal being privileged, a speedy hearing can be obtained. I am inclined to suspend the issuance of the injunction until after the determination of the appeal, provided (1) the appeal is brought on for a hearing at the May session of the Circuit Court of Appeals; and (2) that the corporation defendants furnish an adequate bond to pay damages and account for profits during the pendency of the appeal, if it is unsuccessful. If the issuance of the injunction is not sus-

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pending appeal, a bond by the complainant to answer all damages occasioned by the issuance of the injunction would seem proper.

Counsel may present memoranda and affidavit upon these suggestions and the amount of bonds necessary for the protection of the respective interests.

**[117] WARE-KRAMER TOBACCO CO. v. AMERICAN TOBACCO CO. ET AL.<sup>a</sup>**

(Circuit Court, E. D. North Carolina. March 8, 1910.)

[178 Fed. Rep., 117.]

**COURTS (§ 277)—FEDERAL COURTS—DISTRICT OF SUIT—DETERMINATION OF QUESTION.**—The question whether a suit in a federal court is maintainable in the district where brought, under the statute, may be raised either by motion to set aside the service of process or by special demurrer, where a special appearance is made for that purpose only, and before pleading to the merits; but the right is waived by filing a general demurrer or pleading to the merits.<sup>b</sup>

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 818; Dec. Dig. § 277.

Waiver of right as to district of federal court in which suit must be brought, see notes to *Memphis Sav. Bank v. Houchens*, 52 C. C. A. 192; *McPhee & McGinnity Co. v. Union Pac. R. Co.*, 87 C. C. A. 34.]

**COURTS (§ 274)—FEDERAL COURTS—DISTRICT IN WHICH SUIT MUST BE BROUGHT.**—An action against a corporation in a federal court for a common-law tort can be maintained only in the district of plaintiff's residence, or that in which defendant is incorporated, and such requirement cannot be avoided by joining in the same complaint another count stating an entirely separate cause of action of which the court has jurisdiction, nor by stating a joint cause of action against such defendant and another which is an inhabitant of the district and may be there sued; the cause of action being several as well as joint.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 274.]

**MONOPOLIES (§ 28)—PLEADING (§ 364)—ACTION FOR DAMAGES UNDER ANTI-TRUST ACT.**—In an action under Anti-Trust Act July 2, 1890,

<sup>a</sup> For opinion overruling demurrer to amended complaint (180 Fed. Rep. 161) see *post*, page 780.

<sup>b</sup> Syllabus copyrighted, 1910, by West Publishing Company.

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c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202). to recover damages for an alleged unlawful conspiracy or combination in restraint of interstate trade and commerce, owing to the complicated nature of the case and the numerous elements which may enter into such a conspiracy, the plaintiff must be given liberal latitude in his pleading, and matter will not be stricken from his complaint on motion under a state statute as "irrelevant and redundant," unless it is clearly so; but matter which is manifestly purely evidentiary will be stricken out.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 28; Pleading, Dec. Dig. § 364.]

Action by the Ware-Kramer Tobacco Company against the American Tobacco Company and the Wells-Whitehead Tobacco Company. On special demurrer to complaint and motion to strike out matter as irrelevant and redundant. Demurrer sustained, and motion sustained in part.

*F. A. Daniels, C. C. Daniels, and F. A. Woodard, for plaintiff.*

*Aycock and Winston, Junius Parker, and F. L. Fuller, for defendants.*

[118] CONNOR, District Judge.

It appears upon the face of the complaint: that the plaintiff is a corporation, chartered and organized under and pursuant to the laws of the state of Virginia, having its principal office in the city of Norfolk in said state. That the defendant American Tobacco Company is a corporation chartered and organized under and pursuant to the laws of the state of New Jersey, having a branch office in the city of Durham, in the Eastern district of North Carolina, with a resident agent upon whom process in said district may be served. The defendant Wells-Whitehead Tobacco Company is a corporation chartered and organized under and pursuant to the laws of the state of North Carolina, having its principal office in the town of Wilson in said district.

The action is brought against the defendants jointly, and the complaint, complying with the provisions of the Code of Procedure of North Carolina, sets forth, separately, two causes of action. In the first it is alleged: That the plaintiff

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is, and has been for several years, in its own right and as the successor of a formerly existing corporation, engaged in the manufacture and sale of cigarettes, selling them in the state of Virginia and other states of the Union and in foreign countries, thereby engaging in interstate and foreign trade and commerce. That, while so engaged in business, the defendant corporation in violation of the provisions of the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 210, c. 647 [U. S. Comp. St. 1901, p. 3202; 7 Fed. Stat. Ann. p. 345]), entered into and formed an unlawful combination and conspiracy to create and did, pursuant thereto, create, a monopoly, the purpose and effect of which was to control and monopolize certain branches of the tobacco business and trade between the states and with foreign countries. The allegations upon which plaintiff bases its right to sue are full and specific. It complies with the requirements of the act in that respect. *Wheeler-Stenzell Co. v. Nat. Window Glass Ass'n*, 152 Fed. 864, 81 C. C. A. 658, 10 L. R. A. (N. S.) 972; *Loewe v. Lawler*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488. That, by reason of such unlawful combination, and the acts of defendants pursuant thereto, plaintiff sustained injury to its property and business in the sum of \$400,000. Pursuant to the provisions of section 7 of the act, judgment is demanded for treble damages—\$1,200,000. The statute is expressly referred to in the complaint and made the basis of the first cause of action.

In the second cause of action the averments in regard to the character and citizenship of the parties are repeated. Omitting matter not material to the decision of the question now under consideration, the plaintiff alleges: That, at the dates set out, it was engaged in the manufacture of cigarettes, etc. That it was engaged in trade and commerce between the states and with foreign nations. "That the defendants conspired, combined, confederated, and agreed to and with each other, and other persons, firms, and corporations, their officers, agents, and employees, to injure and destroy the business of plaintiff, and in furtherance thereof, etc., adopted"

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certain means and methods, all of which are fully set forth. Plaintiff further alleges:

[119] "That with intent to impede, impair, injure, and destroy the business of plaintiff, the defendants maliciously, wantonly, willfully, oppressively, and wickedly, through their officers and agents, acting within the scope of their employment, and by direction of, and with the approval of, the defendants, committed the wrongs herein set forth, whereby the business and property of plaintiff has been greatly impaired and injured to its damage, to wit, in the sum of \$1,000,000. Wherefore plaintiff prays judgment against the defendants for the sum of \$1,000,000 as punitive or vindictive damages, etc."

The defendant American Tobacco Company entered a special appearance for the purpose of filing a motion and special demurrer to the plaintiff's second cause of action, for that, as appears upon the face of the complaint, the plaintiff is a citizen and resident of the state of Virginia, and the defendant is a resident and citizen of the state of New Jersey.

The contention of the defendant American Tobacco Company is founded upon the proposition that, while it is conceded that, as to the first cause of action brought under the Sherman Anti-Trust Act, the seventh section of which provides that any person injured in his business or property by any other person, or corporation, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides, or is found, the action is properly brought in this court. That, in respect to the second cause of action in which plaintiff seeks to recover punitive, or vindictive, damages for alleged injuries to its business, it can be sued only in the district in which it is "an inhabitant." To sustain this contention, it relies upon the provisions of the act of 1887, amended by the act of 1888 (Act of March 3, 1887, c. 373, 24 Stat. 552, as amended by Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508; 4 Fed. St. Ann. 265]). By this act, jurisdiction is conferred upon the Circuit Courts of the United States, where the jurisdictional sum is involved, between citizens of different states; but it is expressly provided:

"That no civil suit shall be brought before either of said courts against any person, by any original process or proceeding, in any

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other district than that whereof he is an inhabitant; but when the jurisdiction is founded only on the fact that the action is between citizens of different states, suits shall be brought only in the district of the residence of either the plaintiff or the defendant."

It is conceded that, as to the defendant Wells-Whitehead Tobacco Company being incorporated and residing in the Eastern district of North Carolina, the action is properly brought. The question of venue may be raised, either by motion to set aside the service of process, or by special demurrer, when a special appearance is made for that purpose only and before pleading to the merits. *Southern Pac. Ry. v. Denton*, 146 U. S. 206, 13 Sup. Ct. 44, 36 L. Ed. 942; *Cent. Ry. Co. v. Pinkney*, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. Ed. 699; Street's Fed. Eq. Prac. § 390. The right to raise the question of venue is waived by pleading to the merits or by filing a general demurrer. Street's Fed. Eq. Prac. § 387. It is well settled that a corporation is, within the provisions of the act, a citizen and an inhabitant of the state in which it is incorporated, although it may carry on business, have property, and maintain agents for service of process in other [120] states. *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; *So. Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942; *In re Keasbey*, 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402; *Macon Grocery Co. v. Atlantic Coast Line Ry.*, 215 U. S. 501, 30 Sup. Ct. 184, 54 L. Ed. 300.

It is clear, therefore, that for violations of the Anti-Trust Act the defendant may be sued in any district in which "it is found," and that it "is found" wherever there is some agent or representative upon whom service of process may be made. For a cause of action growing out of a breach of duty, or tort, the jurisdiction of which is not otherwise provided for, a corporation can be sued in the Circuit Court only in the district whereof it is "an inhabitant"; that is, where it is incorporated. It is clear that the second cause of action sets forth a common-law tort—malicious injury to plaintiff's business. The two causes of action are separate and distinct, founded and dependent upon distinct and, in many essential respects, different principles. It is recognized by the pleader that, while, for the wrongs set forth as the



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basis of the first cause of action, he relies upon the language of the statute, alleges specific, actual damages to the plaintiff's property and business and demands the statutory measure of recovery, in the second cause of action he properly alleges that the wrongs of which he complains were committed maliciously, willfully, wickedly, etc., and for this he demands punitive, or vindictive, damages. It is manifest that, for the matters and things set forth in the second cause of action, the plaintiff must find his right to invoke the jurisdiction of the Circuit Court of the United States, in the act of 1887-88, because of the diversity of citizenship between defendant and itself, and that, in seeking defendant for the purpose of suing, it is, by the express provisions of the act, compelled to go to the district of which it is "an inhabitant," or sue in the district of its own residence, unless defendant waives its privilege and consents to be sued in some other district. The plaintiff has sued in a district of which neither the defendant, nor itself, is an inhabitant, and defendant, in the appropriate way, raises the objection to the venue. Does the fact that it is sued jointly with the Wells-Whitehead Company, an inhabitant of this district, for a wrong alleged to have been committed jointly, deprive it of the right to make the objection?

In *Strawbridge v. Curtiss*, 3 Cranch, 267, 2 L. Ed. 435, Chief Justice Marshall said:

"Each distinct interest shall be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts."

In *Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. Ed. 179, it is said:

"If there be several defendants, each defendant must be liable to be sued, or the jurisdiction cannot be entertained." *Anderson v. Watt*, 138 U. S. 694, 11 Sup. Ct. 449, 34 L. Ed. 1078.

The question is discussed by Circuit Judge Gray in *Lengel v. Am. Smelt. & Ref. Co.* (C. C.) 110 Fed. 19. After citing the authorities, the learned judge says:

"The cases in the Supreme Court, just referred to, were, it is true, dealing with the question of diverse citizenship only, as a ground of jurisdiction; [121] but the reasoning by which the conclusion is reached, that all the indispensable parties must be competent to sue, or be sued, in order to support the jurisdiction, is applicable to the

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requirements of the act of 1888, upon which the motion to dismiss is grounded. When the jurisdiction, therefore, is founded only on the fact that the action is between citizens of different states, as is the case here, the requirement of the act plainly is that suit must be brought either in the district where all the plaintiffs, if there be more than one, reside, or in the district where all the defendants, if there be more than one, reside. In this case the suit having been brought by a citizen and resident of Pennsylvania, in the district of New Jersey, it is requisite, under the act in question, that all the defendants named in the bill be residents of New Jersey." *Jenkins v. York Cliff Co.* (C. C.) 110 Fed. 807; *Escelstor Co. v. Brown*, 74 Fed. 321. 20 C. C. A. 428.

It is well settled that the defendants may be sued separately.

"When several persons have been jointly concerned in the commission of a wrongful act, they may all be charged jointly as principals, or the plaintiff may sue all of them separately, torts being in their nature several, even when the wrongful act was jointly committed." *Sessions v. Johnson*, 95 U. S. 347, 24 L. Ed. 596.

"The act of each of several joint wrongdoers is regarded as the act of all, and the acts of all, in consummation of a common purpose, are regarded as the acts of each." *Powell v. Thompson*, 80 Ala. 56; *Graham v. Houston*, 15 N. C. 232.

From an examination of the authorities it would seem clear that, as to the second cause of action, the defendant American Tobacco Company can be sued only in the district whereof "it is an inhabitant." The special demurrer must be sustained. As the defendant Wells-Whitehead Tobacco Company does not join in the demurrer, the only order which, following the practice prescribed by the Code of Civil Procedure of North Carolina, can be made, is that, as to the defendant the American Tobacco Company, the second cause of action be dismissed. It is so ordered.

The defendants moved the court to strike out certain portions of paragraphs, and the whole of certain paragraphs, in the complaint specifically set out in the motion, for that they were immaterial, irrelevant, redundant, and contained mere evidence instead of allegation. This being an action at law, the rules of practice, pleading, and procedure shall conform, as near as may be, to those rules prevailing in the state Code of Practice and Pleading. While, therefore, in disposing of the motion, recourse must be had to the North Carolina Code

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of Civil Procedure, where, in like cases, the Supreme Court of the United States has made deliverance, its decisions must control. The elementary principle, upon which all modern Codes of pleading is based, requires the plaintiff, in his complaint or declaration, to set forth "a plain and concise statement of the facts constituting a cause of action without unnecessary repetition." For a violation of this rule, the defendant may move the court to strike out irrelevant and redundant matter. Revisal 1905, § 496. While the courts will, in proper cases, grant such motion, they usually permit a plaintiff to state his cause of action in his own way, provided he avoids scandalous and indecent matter. It is very difficult to analyze a complaint and eliminate all matter which may, upon the trial, prove to be immaterial or irrelevant without unduly restricting the plaintiff's right to "tell a connected story" of his grievance. The strict technical rules of pleading, the enforcement of which so often delayed and frequently defeated justice, have been abrogated by modern codes, or rules of court. It is, however, an elementary rule of pleading which should always be observed and enforced that facts, and not evidence, should be alleged. The purpose of all pleading is to bring the parties, at the earliest possible period, after the writ is issued, to either the general issue or, when proper, to specific issues of fact, the decision of which, by the jury, will enable the court to determine and declare the legal right and enforce the legal remedy. There are a number of causes of actions, or remediable wrongs, which, from their nature, cannot be stated with sufficient definiteness to enable the court to proceed without resorting to more than the usual particularity of allegation. This is peculiarly true where an unlawful conspiracy is charged. For the purpose of removing uncertainty in allegation, either in indictments or complaints in such cases, the courts usually require, upon demand, a bill of particulars. A very satisfactory description of a complaint sufficiently definite in an action for unlawful conspiracy is found in *Murray v. McGarigle*, 69 Wis. 483, 34 N. W. 522, wherein it is said:

"A complaint for conspiracy setting out, by way of inducement, the circumstances under which the injury complained of was committed, the conspiring together and common purpose of the defendants, the

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means used to accomplish their present purpose, the objects to be attained, the overt acts of one, or more, of the defendants in pursuance of such common purpose, is sufficiently definite."

So Chief Justice Shaw, in the leading case of *Com. v. Hunt*, 4 Metc. (Mass.) 126, 38 Am. Dec. 346, says:

"Conspiracy is an offense which specifically demands the application of that wise and humane rule of the common law that an indictment shall state, with as much certainty as the nature of the case will admit, the facts which constitute the crime intended to be charged."

"It is never enough that the purpose or the means are so described that they may be unlawful. If that is left uncertain, the indictment is fatally defective. It must appear to the court that, if the facts alleged are proved as stated, without any additional fact, or circumstance, there can be no doubt of the illegality of the conduct charged, nor of its criminality." *State v. Parker*, 43 N. H. 85.

Chief Justice Fuller, in *Pettibone v. U. S.*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419, says:

"The general rule in reference to an indictment (for conspiracy) is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intentment or implication. The charge must be made directly, and not by implication, or by way of recital." *United States v. Oarll*, 105 U. S. 612, 26 L. Ed. 1135.

In *Swift & Co. v. U. S.*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, in discussing the sufficiency of the bill, in a suit in equity, brought under the Anti-Trust Act, Mr. Justice Holmes says:

"The scheme alleged is so vast that it presents a new problem in pleading. If, as we must assume, the scheme is entertained, it is, of course, contrary to the very words of the statute. Its size makes the violation of the law more conspicuous, and yet the same thing makes it impossible to fasten the principal fact to a certain time and place. The elements, too, are so numerous and [123] shifting, even the constituent parts alleged are and, from their nature, must be, so extensive in time and space, that something of the same impossibility applies to them."

Colt, Circuit Judge, in *Cilley v. United States Mac. Co.* (C. C.) 152 Fed. 726, sustaining a demurrer to the declaration in an action brought under the seventh section of the statute, says:

"Under the act of July 2, 1890, it is not sufficient to frame the declaration in the words of the statute. The statute does not set

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forth the elements of the offenses which are forbidden; and, further, there may be contracts in restraint of trade between the states or with foreign countries, and attempts to monopolize such trade or commerce which are not within the statute. These circumstances made it imperative that the substance of the contracts in restraint of trade, or the substantial facts which constitute the attempt to monopolize, should be set forth in the declaration."

In *Rice v. Standard Oil Co.* (C. C.) 134 Fed. 464, an action brought under the statute, the defendant moved the court to strike out the entire declaration on the ground that it was "irregular and defective and so framed as to prejudice, embarrass, and delay a final trial of the action." Lanning, District Judge, discussing the question, says:

"It is apparent that mere proof that the defendant has entered into a contract, or engaged in a combination or conspiracy in restraint of trade, or commerce, among the several states, will not be sufficient to support a cause of action under the seventh section, for there must, in addition thereto, be proof that the plaintiff has, by reason thereof, sustained damage. In his declaration, therefore, the plaintiff must aver not only facts showing such a contract or combination as is declared to be unlawful, but facts showing that, by reason of such unlawful contract, or combination, he has been injured in his business or property."

It is not contended that the complaint, in its entirety, is demurrable for that it does not set forth a cause of action or is not sufficiently definite, but that it contains "irrelevant and redundant matter." Many of the cases cited by defendant discuss the merits of the complaint upon demurrer—that the allegations do not set out any cause of action within the words or purview of the statute. The motion to strike out irrelevant and redundant matter cannot be resorted to for the purpose of trying the question of the sufficiency of the complaint; that can be done only by a demurrer. 20 Enc. Pl. & Pr. 988. If the complaint sets out no more than is required to sustain the action, such matter cannot be said to be irrelevant or redundant, although there may be, intermingled with the essential allegation, expressions and language not, strictly speaking, necessary. It is uniformly held that, in order to recover, the plaintiff must allege that the defendants have formed a conspiracy, or combination, in restraint of trade, or, if there be but one defendant whose

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acts are made the basis of the action, that it is of itself such a combination, within the purview of the act. To do this it is not only proper, but necessary to set forth fully the origin, character of defendant, its history, in regard to the alleged unlawful conduct, growth, methods of business in the respect complained of, and its combination with the other persons or corporations involved, etc. It is only in recent years that actions of this character have found their way into the courts and, as said by Mr. Justice Holmes:

"They present a new problem in pleading."

[124] What constitutes a combination in restraint of trade, within the meaning of the act, although frequently discussed and, in a few cases, decided, has not yet passed beyond the domain of debate in the courts. Two cases of national concern, in one of which one of the present defendants is a party, involving the question, are now pending in the Supreme Court. In the *Northern Securities Co. case*, 193 U. S. 331, 24 Sup. Ct. 454 (48 L. Ed. 679), it is said:

"The act declares illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, whoever may be the parties to it, which directly, or necessarily, operates in restraint of trade or commerce among the several states."

In several of the reported cases, the complaint, declaration, or petition is set out in full showing that, in setting forth the first essential fact, the pleaders have given a full history of the conduct and course of business of the defendants, and this has generally been sustained by the courts. While it may be that some unnecessary matter is referred to in the complaint in this case, taken as a whole, it conforms to the precedents which we have. To eliminate all such matter which, upon a critical analysis, might seem irrelevant or redundant, would endanger the structure upon which the plaintiff's cause of action is founded. Pleadings are to be given a fair, liberal construction. If, upon the trial, such matters are found to be irrelevant, they will be eliminated by excluding evidence in regard to them.

The plaintiff must set forth its own origin, character of business, and other relevant matter, so that the court may see that its business bears such relation to the alleged un-

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lawful character and conduct of defendants as brings it within the provisions of the statute. This has been done. The final and essential allegation is, that "by reason of" the conduct of defendant in doing the things forbidden, or declared to be unlawful, it has been injured in "its business or property," and the character and extent of the damage. In meeting this requirement, the plaintiff sets forth, at much length, a course of conduct by defendant American Tobacco Company, by itself, and in connection with its co-defendant, which brings the case clearly within the principles announced in *Loewe v. Lawler*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488.

Referring to the declaration in that case, Chief Justice Fuller says:

"We have given the declaration in full in the margin, and it appears therefrom that it is charged that defendants formed a combination to directly restrain plaintiff's trade; that the trade to be restrained was interstate; that certain means to attain such restraint were contrived to be used and employed to that end; that these measures were so used and employed by defendants; and that thereby they injured plaintiff's business."

The demurrer was overruled. In the same case, Platt, District Judge, on a motion to strike out matter from the complaint, says:

"It is not understood to be one of the functions of the court on such a motion as this to compel the plaintiffs to state their case in the way most satisfactory to defendants. Indeed, it is not easy to conceive how such a complicated situation, covering as it does such an important and serious question, could have been otherwise set forth. At any rate, a close scrutiny of the complaint discloses nothing which is so obviously wrong that it ought to be expunged on motion."

[125] It is true, as suggested by defendants, that this case involved a charge of an unlawful combination involving a labor boycott. This, however, does not affect the question under discussion. In *People's Tob. Co. v. Am. Tob. Co.*, 170 Fed. 396, 95 C. C. A. 566, an action brought under section 7 of the act, Circuit Judge Shelby, after enumerating the essential averments of the petition, says:

"If the petition contains these essential averments, it is not subject to an exception of no cause of action, although it may contain

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surplusage and may specify some of the items of damage, which may not be recoverable."

He uses the following language, which may well be applied to the complaint in this case:

"At a great length, and with minute details, the petition alleges and describes the combination or conspiracy in restraint of interstate trade and commerce, showing that it is such as is condemned by the first section of the act. With equal fullness there are allegations of an attempt by the defendants, with other conspirators, to monopolize the trade or commerce in tobacco among the several states, such an attempt and conspiracy as is condemned by the second section of the act. It is there alleged that the plaintiff was engaged in interstate trade, or business, such as that engaged in by defendant's companies, and that the described acts of the defendant were done for the purpose of obtaining a monopoly and destroying the business of the plaintiff."

The demurrer was overruled, reversing the district judge. While, in several of the cases found in the reports, a tendency appears to restrict the language of the act and narrow the remedy provided by section 7, there is a manifest tendency on the part of the Supreme Court, and many cases in the Circuit Court, to apply to the act the fundamental rule of construction which requires the court to so interpret statutes that they repress the evil and advance the remedy. The evil at which this statute is aimed is of national importance, and the remedies provided for its punishment and repression should not be restricted by technical and narrow rules of pleading. If the plaintiff in an intelligent way and by "a connected story" sets forth his grievance, he should not be turned away from the court or his pleading so mutilated, by striking out more or less essential averments, as to embarrass him and unduly limit the scope of his proof when he comes to trial. The motion to strike out matters of averment is denied. It is, however, manifest that, in several respects, the complaint sets out matter which is purely evidentiary. This should be eliminated.

In paragraph 6 of the first cause of action it is alleged:

"That the American Tobacco Company constitutes, and is itself, a combination in violation of the act of Congress approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' and has been so held and adjudged in a final decree of the United States Circuit Court for the Southern Dis-



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trict of New York in the *United States v. American Tobacco Co. and others*, filed December 15, 1908, and said decree is here expressly pleaded and asked to be made a part hereof, a copy of which is hereto attached, marked 'A.' "

It does not appear how the decision of the Circuit Court of New York in a suit in equity brought by the Government for the purpose of enjoining the defendant American Tobacco Company, and other corporations, from holding stock in said corporations, can, in any [126] manner, be relevant to, or affect, the plaintiff's cause of action. The suit is not between the parties to this action, or any one in privity with them, nor has the plaintiff any connection with any of the parties to it. The only way, and the sole purpose for which a judgment in another suit may be pleaded, is to show an estoppel of record or sustain the plea of *res judicata*. If the purpose of the allegation is to advise the court that another court has adjudged the defendant to be a violator of the law, this may be done by citing the decision as an authority. It will be noted that the decree provides that, if any of the parties enjoined appeal to the Supreme Court, the injunction shall be suspended during the pending of such appeal. It is a matter within our knowledge that the cause is now pending on appeal in the Supreme Court of the United States. The allegation presents no issuable controversy, nor would the decree, or the fact that any such suit is pending, be competent in evidence upon any issue which could possibly be founded upon the pleadings. The averment is not only evidentiary, but irrelevant.

The motion to strike it out is allowed.

In paragraph 15 it is alleged:

"That the illegal purpose of the defendants to injure and destroy the business of plaintiffs is disclosed by certain letters written or received by Percival J. Hill, vice president of the American Tobacco Company, to or from W. M. Carter, R. G. Briggs, and others, and found in the letter book of said Percy J. Hill; the said letters having been introduced in evidence in the case of *United States v. American Tobacco Co.*, tried in the United States Circuit Court," etc.

It may be that several of the letters attached as Exhibits B, C, D would be competent evidence on the trial of the case; but many of them do not, so far as can be seen, have

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any relevancy to the issues. In any event, they are but evidentiary, and do not come within the well-settled rules of pleading as proper exhibits. The paragraphs referring to them, together with the exhibits, should be stricken out.

In the supplemental complaint filed after W. M. Carter had been made a party defendant, certain conversations alleged to have been had by said Carter, set out in full, and a typewritten memorandum made at the time by way of exhibit, are attacked. This matter and the exhibit is strictly evidentiary. The declarations of Carter relied upon to show a conspiracy between his co-defendants and himself are incompetent as against them, and would not be admissible in evidence. They should not be set out in the complaint.

The motion to strike out the alleged conversations with Carter and the Exhibit E is allowed.

In all other respects than those referred to, the motion is denied.

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[160] WARE-KRAMER TOBACCO CO. ET AL. v.  
AMERICAN TOBACCO CO. ET AL.\*

(Circuit Court, E. D. North Carolina, Raleigh Division. June 16, 1910.)

[180 Fed. Rep., 160.]

**EQUITY (§ 153)—PLEADING—REQUISITES.**—A bill in equity should be construed to mean what it fairly conveys by a fairly exact use of English speech.<sup>b</sup>

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 896; Dec. Dig. § 153.]

**[161] ACTION (§ 5)—VIOLATION OF STATUTES—RIGHT TO RECOVER.**—By violating a criminal or penal statute one does not render himself liable to a private citizen unless the unlawful conduct is the proximate cause of, or results in, some special injury to such citizen's business or property.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 5.]

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\* For opinion sustaining demurrer to original complaint (178 Fed. Rep. 117) see *ante*, p. 768.

<sup>b</sup> Syllabus copyrighted, 1910, by West Publishing Company.

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**MONOPOLIES (§ 12)—ANTI-TRUST LAW—PURPOSE.**—The prohibitory provisions of Anti-Trust Law July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), apply to all contracts in restraint of interstate or foreign trade or commerce, without exception or limitation, and are not confined to those in which the restraint is unreasonable.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

**MONOPOLIES (§ 28)—ANTI-TRUST LAW—PRIVATE SUITS FOR VIOLATION.**—Under the express terms of Anti-Trust Law July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), one injured in business or property by another through a combination or conspiracy to restrain or monopolize interstate trade may sue for his damage.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.]

**MONOPOLIES (§ 28)—ANTI-TRUST LAW—PRIVATE SUIT FOR VIOLATION—PLEADING—SUFFICIENCY.**—A complaint, under Anti-Trust Law July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), for damages, is not insufficient as failing to show a violation of the law or injury to plaintiff, where it sets out the origin and history of one of defendant companies in absorbing competing companies engaged in manufacturing tobacco; a history of the formation, growth, etc., of the other defendant company; absorption of the latter by the former, under an agreement to keep the purchase secret, all done in furtherance of the first company's purpose to monopolize the business of manufacturing tobacco and cigarettes in violation of such law; a conspiracy between the two companies to monopolize the supply of manufactured tobacco throughout the country; that in furtherance of a general plan to restrain interstate trade in tobacco, and monopolize its manufacture and sale, defendants first resorted to unfair and oppressive means, fully set out, to prevent plaintiff company's organization; that plaintiff's stockholders and prospective stockholders were threatened with injury in business if they pressed the plaintiff's business; that one of plaintiff's incorporators was offered inducements to abandon plaintiff; that false and unjust statements were circulated concerning plaintiff; that plaintiff established a prosperous interstate business and would have grown but for defendants' unlawful acts; that plaintiff's customers were unlawfully taken away by defendants' threats and inducements; that cigarettes were sold below cost; that jobbers and dealers in plaintiff's territory were given free goods and extra discounts to press sales as against plaintiff's goods; that defendants' employee obtained employment as plaintiff's sales manager to injure and did injure plaintiff's business in a specified way, as part of defendants' scheme; that defendants conspired to destroy plaintiff's business, etc.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 28.]

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**PLEADING (§ 68)—SUFFICIENCY—ALLEGATIONS ON BELIEF.**—An allegation that plaintiff has "reason to believe," and therefore "alleges," etc., is sufficient under Revisal N. C. 1905, § 489, requiring matter to be alleged as of plaintiff's knowledge or upon "information and belief."

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 140; Dec. Dig. § 68.]

[162] Suit by Ware-Kramer Tobacco Company and another against the American Tobacco Company and others. On demurrer to the amended complaint. Demurrer overruled.

*F. A. Daniels, C. C. Daniels, F. A. Woodard, and N. T. Green*, for plaintiffs.

*Aycock and Winston, Junius Parker, and F. L. Fuller*, for defendants.

CONNOR, District Judge.

The plaintiff, in accordance with the opinion filed herein, May 8, 1910 (178 Fed. 117), upon the motion made by defendant to strike out certain portions of the complaint, has filed an amended complaint, containing all of the material averments in the original. Defendants join in a demurrer, the specific grounds of which are:

1. That the complaint does not state any facts showing that defendants, or either of them, have violated the federal anti-trust law—have monopolized, or attempted to monopolize, or have contracted, combined, or conspired to restrain interstate or foreign trade or commerce, or that such has been the effect of the acts and facts therein alleged.

2. That it does not state any facts showing that plaintiff has been injured by any violation of the anti-trust law, or any acts monopolizing, or attempting to monopolize, any contracts, combinations, or conspiracies to restrain interstate or foreign trade or commerce, as injuriously affecting the plaintiff.

3. That it does state facts showing that the acts complained of are only such as have always been permissible in competition, and only such as are not only not forbidden, but are specially encouraged, by the federal anti-trust law.

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It is neither necessary, nor desirable, at this time, and in the present condition of the record, to do more than ascertain whether, in view of such decisions as have been made throwing light upon the interpretation of the statute, the facts alleged, with the inferences to be drawn therefrom, most favorable to plaintiff, the action can be maintained. It is conceded that, before an affirmative answer can be given to this question, it must appear from allegations in the complaint:

1. That defendants, the American Tobacco Company and the Wells-Whitehead Tobacco Company, have entered into "a contract, or combination, in the form of a trust, or otherwise," or conspiracy in restraint of interstate trade or commerce; or "that defendants have monopolized, or attempted to monopolize, or have combined or conspired to monopolize a part of the trade or commerce among the several states, or with some foreign nation." These, and each of them, are "the things forbidden and declared to be unlawful" by the act.

2. That plaintiff has been injured, as alleged, in its "business or property" by reason of the unlawful acts of defendants.

These are the essential elements, upon the existence of which the plaintiff's action is founded. Act July 2, 1890, c. 647, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202).

[163] The complaint, at considerable length, with fullness of detail, and in substantial respects corresponding to declarations, petitions, and bills in equity, held sufficient by the federal courts, sets out the origin, history, growth, and conduct of the defendant American Tobacco Company in absorbing competing companies, or companies engaged in the manufacture of tobacco in all of its forms. The complaint proceeds to set forth a history of the formation, growth, etc., of the defendant Wells-Whitehead Tobacco Company, and, after describing the various attempts of the American Tobacco Company to destroy its business, sets forth the manner in which it acquired a controlling interest in the stock of said Wells-Whitehead Company, alleging an agreement between the officers of both companies that the

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purchase should be kept secret, etc. All of this, it is alleged, was in furtherance of the purpose of the American Tobacco Company to monopolize the business of manufacturing tobacco and cigarettes in violation of the provisions of the federal Anti-Trust law. The complaint, in this respect, is drawn upon the lines, and in substantial accordance with the petition, or bill, in *People's Tobacco Co. v. Am. Tobacco Co.*, 170 Fed. 406, 95 C. C. A. 566, and sustained by the Circuit Court of Appeals of the Fifth Circuit.

In *Swift v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, Mr. Justice Holmes, discussing a demurrer to the bill in equity filed by the government for the purpose of enjoining the "meat trust," for alleged violation of the statute, says:

"The scheme, as a whole, seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give the scheme a body and, for all that we can say, accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as parts of a single plan. The plan may make the parts unlawful. The statute gives this proceeding against combinations in restraint of trade among the states and attempts to monopolize the same."

In *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, at page 244, 20 Sup. Ct. 96, at page 108 (44 L. Ed. 136), Mr. Justice Peckham says:

"We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made. Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade. It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded. All the facts and circumstances are, however, to be considered in order to determine the fundamental question whether the necessary effect of the combination is to restrain interstate commerce."

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The learned justice, after an exhaustive and careful analysis of the allegations in the bill, writing for the unanimous court, overrules the demurrer. In the complaint herein is found, "after all the specific [164] charges, a general allegation that the defendants have conspired with one another to monopolize the supply of manufactured tobacco, cigars, and cigarettes throughout the United States," and, as said by Judge Holmes:

"This general allegation of intent colors and applies to all the specific charges in the bill. Whatever may be thought concerning the proper construction of the statute, a bill in equity is not to be read and construed as an indictment would have been read and construed a hundred years ago; but it is to be taken to mean what it fairly conveys to a dispassionate reader, by a fairly exact use of English speech."

In *People's Tobacco Co. v. A. T. Co.*, *supra*, Judge Shelby, discussing the demurrer to the complaint, says:

"At great length, and with minute details, the petition alleges and describes this combination or conspiracy in restraint of interstate trade, or commerce, showing that it is such as is condemned by the first section of the act. With equal fullness, there are allegations of an attempt by defendants, with other conspirators, to monopolize the trade or commerce in tobacco among the several states—such an attempt and conspiracy as is condemned by the second section of the act." *Montague v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608.

In *United States v. MacAndrews & Forbes Co.* (C. C.) 149 Fed. 823, an indictment drawn under the Anti-Trust Act was considered upon demurrer by District Judge Hough. He says:

"The criterion as to whether any given business scheme falls within the prohibition of the statute is its effect upon interstate commerce, which need not be a total suppression of trade or a complete monopoly; it is enough if its necessary operation tends to restrain interstate commerce and to deprive the public of the advantage flowing from free competition."

The learned judge, after reciting the acts charged to have been committed by the defendant, says:

"Not only do the facts alleged show a combination producing a result detrimental to interstate commerce, but they also show con-

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certed action to bring about that result, and the result, as shown, constitutes that 'virtual' monopoly in the interstate distribution of the substance manufactured by the corporate defendants which brings the matter within the decisions differentiating the modern use of the word 'monopoly' from that grant by royal patent which was the origin of the phrase."

This language is appropriate to the description given, in the complaint, of defendants' relation to the manufacture of tobacco and cigarettes.

It is, however, strongly and earnestly insisted that plaintiff fails to set forth any facts from which the court can see that it has been injured in its business or property by the character and conduct of defendants. The learned counsel says that if it be conceded, for the purpose of the argument, that defendant American Tobacco Company is a monopoly, and that, in securing the controlling interest in the stock of its co-defendant, the Wells-Whitehead Tobacco Company, in the manner and under the circumstances set forth, it formed an unlawful combination, within the meaning of the act, subjecting both corporations to indictment or other proceedings by the government, yet that plaintiff shows no cause of action under the provisions of the [165] seventh section of the act, because in neither nor all of the acts alleged did it exceed what is recognized by the law as fair competition, and this the statute does not prohibit. It is undoubtedly true, as said by counsel, that by violating a criminal or penal statute a person, either natural or corporate, does not render itself liable to be used by a private citizen unless the unlawful conduct is the proximate cause of, or results in, some special injury to the business or property of the person bringing the action. Counsel ask: May not defendants, although violators of the public law, until called to account by the sovereign, prosecute their business in a lawful way? May they not engage in fair competition with others engaged in the same business? May they not advertise their wares, undersell their competitors in open market, send their agents into the markets of the country and, by fair and well-recognized rules of competition, offer their goods for sale?



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How, he asks, does this injure the public or "raise prices"—restrain or interfere with trade or commerce? In construing the statute it must be kept in view that:

"Its prohibitory provisions apply to all contracts in restraint of interstate, or foreign, trade or commerce, without exception or limitation; and are not confined to those in which the restraint is unreasonable."

Hence, as said by Mr. Justice Peckham, in regard to a combination to establish rates:

"The claim that the company has the right to charge reasonable rates, and that, therefore, it has the right to enter into a combination with competing roads to maintain such rates, cannot be admitted. The conclusion does not follow from the premise. What one company may do, in the way of charging reasonable rates, is radically different from entering into an agreement with other and competing roads to keep up the rates to that point." *United States v. Freight Ass'n* 166 U. S. 290, at page 339, 17 Sup. Ct. 540, at page 558, 41 L. Ed. 1007; *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259.

It is the combination, or conspiracy, to restrain or to monopolize interstate trade, which is condemned, and if this is established an injury "done to the business or property" of "any person," by reason thereof, constitutes a cause of action. Whether, under the language of the statute, the members of the illegal combination, or the conspiracy, may, in the prosecution of their business, resort to the legal methods open to those who are living in obedience to the law, with immunity from an action for injuries inflicted upon the business or property of others—that is, resort to fair competition—has not, so far as the industry of counsel has revealed, been decided. The position of the plaintiff is that the unlawful combination and its members are "out-laws" and not within the pale of the protection conferred upon those who pursue a lawful calling in a lawful way. The language of the statute (seventh section) is:

"Any person who shall be injured, in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue," etc.

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Chief Justice Fuller, in *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, overruling a demurrer to the petition, says:

[166] "It is charged that defendants formed a combination to directly restrain plaintiff's trade; that the trade to be restrained was interstate; that certain means to attain such restraint were contrived to be used and employed by defendants; and that thereby they injured plaintiff's property and business."

This was held sufficient. Judge Shelby, in *People's Tobacco Co. v. American Tobacco Co.*, supra, discussing a demurrer to the petition substantially like the one before the court, says:

"It is plain that the petition need only aver, and state facts to show, that the defendants have committed one or more of the offenses condemned by the first and second sections of the act, that the plaintiff is a person injured within the meaning of the seventh section, and the amount of damages it has sustained by such injury."

In the light of these decisions, it would seem that the complaint sufficiently alleges facts bringing its grievance within the provisions of the act. It is not charged that the combination between the defendants was formed for the purpose of restraining plaintiff's interstate trade; this, of course, it could not do because the final act of forming a conspiracy or combination—the purchase of a controlling interest in the stock of the Wells-Whitehead Tobacco Company, by the American Tobacco Company—was during the month of July, 1904, whereas the Ware-Kramer Tobacco Company was not organized until October, 1904. The theory upon which the complaint is drawn is: That defendants, being an unlawful combination within the terms of the statute, in furtherance of its general plan, scheme, or purpose to restrain all interstate trade in manufactured tobacco and cigarettes, and to monopolize the manufacture and sale of tobacco, first resorted to unfair and oppressive means, fully set out, to prevent its organization. That one of their managing officers threatened the persons proposing to form and organize plaintiff corporation. That defendant "by fair means or foul" would destroy the proposed corporation. That threats were made by the officers of defendants to stockholders or prospective stockholders of plaintiff company, after it was or-

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ganized, that, if they (some of them being directors and managing officers of plaintiff company) "continued to press the business of the Ware-Kramer Tobacco Company, the American Tobacco Company would take from such persons the sale of its products, particularly snuff, which such persons were, at that time, selling in large quantities." That, to another large stockholder, an officer in a bank, threats were made by an officer of the Wells-Whitehead Tobacco Company:

"That if he persisted in his efforts to make effective the organization, and to make prosperous the business of the Ware-Kramer Tobacco Company, he would find that his interests in enterprises in the business would be made to suffer."

That, to another person engaged in the tobacco warehouse business, in the town of Wilson, N. C., at which the American Tobacco Company and one of its allied companies bought large quantities of leaf tobacco, threats were made calculated to injure his business. That, to another person, one of the incorporators of the plaintiff company, a proposal was made that if plaintiff would surrender its charter all of the expenses incurred would be paid; that the machinery and supplies contracted for, or purchased, would be paid for and taken by defend[167]ants, even if the same were worthless and had to be destroyed, and "that if such person would not proceed further with the Ware-Kramer Tobacco Company defendants would give him a place, the income of which would exceed \$10,000 a year." That false and unjust statements were circulated by defendants, in regard to plaintiff, its business and goods, among others "that defendant American Tobacco Company had failed to kill the Wells-Whitehead Tobacco Company, and that, as a last resort, it had organized the Ware-Kramer Tobacco Company, with which to fight the Wells-Whitehead Tobacco Company." That, notwithstanding these, and other, wrongful acts of the defendants, the Ware-Kramer Tobacco Company organized, and that by reason of the large sums of money and the great amount of energy expended by plaintiff in advertising, introducing, and establishing a market for the sale of "White Roll" cigarettes, coupled with the superior quality of the same, and that they were in favor with the consumers

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of cigarettes, that the brand of "White Roll" cigarettes was on the 1st day of January, 1907, of large value, to wit, the sum of \$150,000. That the business of plaintiff in its southern territory, by reason of the large and well-established reputation and demand for certain of its brands, its business connection with jobbers, merchants, and others, the thorough way in which its goods were advertised and established, was valuable as property and was worth in the market \$250,000. "That by reason of its energy and business judgment, the superior quality of its goods, etc., the demand for plaintiff's goods increased until the summer of 1907 and, but for the unfair and unlawful methods adopted by defendants, and the unfair and unlawful acts of their officers' agents and employés, plaintiff's business would have grown and increased from year to year." That in 1906 plaintiff's business increased largely over that of the preceding year, and that plaintiff was shipping its goods into a number of states of the Union.

Plaintiff alleges: That, during the years named, defendants, by the means aforesaid and other means, such as maintaining a close watch and espionage upon plaintiff's shipments, maintaining a system of spies upon such shipments from the depot at Wilson, N. C., and communicating same to the defendant's officers, both in New York and Wilson, sending their representatives to different customers of plaintiff, and by threats, promises, and inducements, many of plaintiff's customers were unlawfully and unfairly taken from them. That this systematic espionage upon and interference with plaintiff's business continued until it was compelled to move to Norfolk, Va., to escape the same.

Plaintiff sets forth, among others, the following means resorted to by defendants to interfere with and restrain their trade: Using coupons in an unfair manner; selling cigarettes at, and below, the cost of production; paying jobbers extra discounts in territory where plaintiff's cigarettes were selling well; giving jobbers and dealers free goods to induce them to press the sale of their goods, as against plaintiff's goods, and by requiring dealers not to handle plaintiff's goods; by interfering with the labor of independent manufacturers; by making jobbers and dealers afraid to keep exposed to

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view or on their shelves, [168] where they could be seen, the goods of plaintiff for fear the American Tobacco Company would injure the business of such dealer or jobber; by making jobbers and dealers afraid to advertise plaintiff's goods; by the refusal of the American Tobacco Company to sell to and by purposely delaying the shipment and delivery of goods ordered by jobbers and dealers who sold, or advertised, the goods of plaintiff.

Plaintiff, in addition to the foregoing, alleges specifically: That, during the year 1905, it received a proposition from a cigarette dealer in China to manufacture, for him, a large number of cigarettes for the Chinese trade. That plaintiff made for said customer a large order for cigarettes, which were shipped as directed, accepted, and paid for. That said order promised to furnish a market for at least 7,000,000 cigarettes a month. That the vice president of defendant, by means of the espionage aforesaid, ascertained that plaintiff had received said order and made said shipment and immediately communicated with one of its employes, giving him directions to "ascertain to what port these goods were shipped and the name of the consignee. If you cannot learn the name, perhaps you can find out the markings on the case"—concluding: "A car load means to us about five million cigarettes. If we get this information I think we can shut off their market." That this information was obtained and the market was "shut off" to plaintiff's great damage. Finally, plaintiff alleges: That defendant W. M. Carter was in the employment of defendant American Tobacco Company for some time prior to the year 1909. That during the year 1908 he proposed to take a block of stock in plaintiff company, representing that he was an expert salesman and was thoroughly familiar with the cigarette trade and could sell large quantities of plaintiff's goods. That plaintiff's officers accepted the proposition of defendant Carter, and he took 30 shares of its stock and was made manager of plaintiff's sales department and entered upon his duties during the month of February, 1909, and continued to draw his salary until October 1, 1909. That, after becoming manager of plaintiff's sales department, "he purposely and willfully

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so managed the sales department of said business as to greatly decrease and injure the business of said company. He transferred salesmen from territory in which they were acquainted and were selling goods to other territory in which they were strangers," etc. Plaintiff alleges many other wrongful and injurious acts of defendant W. M. Carter, all of which it avers injured its business. "That from various facts and circumstances, plaintiffs have reason to believe, and therefore allege, that the said W. M. Carter was working in the interest of and carrying out the plans and scheme of the defendant the American Tobacco Company, while he was drawing a salary from the Ware-Kramer Tobacco Company, and that his conduct and work, as alleged in the complaint herein, was the work and acts of the defendants, and had for their purpose the injury and destruction of Ware-Kramer Tobacco Company and its elimination as a competitor of the defendant. \* \* \* That the various acts and doings of the said W. M. Carter, as set forth in the complaint herein, were done and performed in pursuance of an agreement and conspiracy entered into by all the de-[169]fendants herein for the purpose of injuring and destroying the business of the plaintiff Ware-Kramer Tobacco Company."

Before proceeding to assign this allegation to its place in the list of plaintiff's grievances, it is proper to note defendants' contention that the matter is not sufficiently alleged in accordance with the provisions of the Code of Civil procedure in this state. The code (Revisal 1905, § 489) prescribes that matter must be alleged either as of the plaintiff's knowledge, or "upon information and belief," and the form of verification makes the distinction between matter alleged of his own knowledge which he avers to be true and matter alleged upon "information and belief" which he avers that "he believes to be true." While the language used is not so clear as it should be, it would seem that the plaintiff intends to allege that it has information—"it has reason to believe," and therefore "alleges." This, reasonably interpreted, means that the allegation is upon "information and belief." If, however, this paragraph be

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eliminated, the next succeeding one has no limitation, but expressly alleges that defendants were in a conspiracy to injure and destroy plaintiff's business by the means set out. It is doubtful whether the first paragraph contains any allegation affecting any of the defendants other than W. M. Carter. There is no ambiguity in the language of the next. Conceding all that is claimed by defendants, in regard to what is fair competition in business, the limits of which have not been very definitely fixed, it is clear that, eliminating all doubtful averments, sufficient allegation remains, admitted by the demurrer, to place the acts of the defendants beyond the limits of fair competition. It would seem that the language of Judge Shelby in *People's Tobacco Co. v. American Tobacco Co.*, *supra*, in this connection, is appropriate:

"It is alleged that plaintiff was engaged in interstate trade, or business, such as that engaged in by the defendant companies, and that the described acts of the defendants were done for the purpose of obtaining a monopoly and destroying the business of the plaintiff. It is further alleged that, by such conspiracies and combinations of the defendants, and by their effort to obtain a monopoly, the business of the plaintiff was injured greatly, and that the plaintiff was damaged (in a large amount). \* \* \* If the averments are true—and the exception of no cause of action admits them to be true—the defendants are guilty of the misdemeanors charged in the first and second section of the act, and the plaintiff has been injured in its business or property within the meaning of the second section."

Here the plaintiff alleges that, by the means set out, it had built up a valuable business, interstate trade, and that this business has been destroyed, and its property is in the hands of a trustee in bankruptcy. Certainly, if these allegations are established to the satisfaction of a jury, it would be difficult to avoid the conclusion that the plaintiff Ware-Kramer Tobacco Company has been injured in its "business and property." It requires no argument to show that the course of conduct pursued by defendants towards the Ware-Kramer Tobacco Company from the moment its projectors conceived the idea of bringing it into corporate existence, through its struggle to take upon itself the form and features of organic life, and while, in defiance of the efforts of defendants to throttle its activities, it maintained an existence

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with [170] promise of success, were calculated and intended not only to restrain but to destroy it. While it may be that some one or more of the "things done," as set out in the complaint, were in and of themselves within the limits of "fair competition," they are, as said by Mr. Justice Holmes, "bound together as the parts of a single whole. The plan may make the parts unlawful." No argument is required to show that the scheme was intended to restrain the interstate trade of plaintiff, and that it "brought that result to pass." While it is true that "fair competition is the life of trade," it is equally true that "unfair and excessive competition" is death to trade—of all competition—followed by the establishment of "monopoly," which my Lord Coke defines to be:

"An institution or allowance to any person or persons, bodies politic or incorporate, of or for the sole buying, selling, making, working or using anything, whereby any person, or persons, bodies politic or corporate are sought to be constrained of any freedom or liberty that they had before, or hindered in their lawful trade."

And which our Constitution, from 1776 to the present day, declares to be "contrary to the genius of a free state and ought not to be allowed." Const. N. C. art. 1, § 31.

The demurrer must be overruled, and defendants allowed 60 days from June 15, 1910, to file answers.

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[115] VIRTUE ET AL. *v.* CREAMERY PACKAGE  
MFG. CO. ET AL.

(Circuit Court of Appeals, Eighth Circuit. March 23, 1910.)

[179 Fed. Rep., 115.]

MONOPOLIES (§ 17)—CONTRACTS IN RESTRAINT OF TRADE—FEDERAL ANTI-TRUST LAW.—A contract by which a manufacturing company, whose products are sold in interstate commerce, makes another sole agent for the sale of its products, is not in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), as in restraint of interstate trade and commerce; its effect on such commerce, if any, being indirect and incidental.\*

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 17.]

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**MONOPOLIES (§ 21)—SUIT FOR INFRINGEMENT—RIGHT TO MAINTAIN.—**

That the owner of a patent is a party to an illegal combination in restraint of trade does not deprive him of the right to sue for infringement of his patent.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 21.]

Rights and liabilities of parties contracting with trusts or combinations in restraint of trade, see note to Chicago Wall Paper Mills v. General Paper Co., 78 C. C. A. 612.]

**MONOPOLIES (§ 28)—COMBINATIONS IN RESTRAINT OF TRADE—ACTION FOR DAMAGES.—**Evidence held insufficient to establish a combination or conspiracy in restraint of interstate trade or commerce between two defendants, each of whom brought a suit against plaintiff for infringement of a different patent, which would sustain an action by plaintiff for treble damages under Sherman Anti-Trust Act, July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202).

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 28.]

**LIBEL AND SLANDER (§ 132)—TITLE—THREATENING SUITS FOR INFRINGEMENT OF PATENT.—**The owner of a patent may lawfully notify infringers, or persons believed to be such, of his claims, and warn them that suit will be brought to protect his legal rights, where he acts in good faith.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 132.]

In Error to the Circuit Court of the United States for the District of Minnesota.

Action by Dennis E. Virtue and the Owatonna Fanning Mill Company against the Creamery Package Manufacturing Company, the Owatonna Manufacturing Company, and Frank La Bare. Judgment for defendants, and plaintiffs bring error. Affirmed.

*Harlan E. Leach* (*Charles I. Reigard* and *James F. Williamson*, on the brief), for plaintiffs in error.

*Emanuel Cohen* (*John B. Atwater* and *Frank W. Shaw*, on the brief), for defendant in error Creamery Package Mfg. Co.

*A. C. Paul* (*W. A. Sperry*, on the brief), for defendants in error Owatonna Mfg. Co. and La Bare.

Before SANBORN and ADAMS, Circuit Judges, and RINER, District Judge.

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[116] RYNER, District Judge.

The plaintiffs in error were plaintiffs in the Circuit Court, the defendants in error were defendants in the Circuit Court, and will be hereafter referred to as plaintiffs and defendants, respectively. This was an action at law to recover treble damages under the seventh section of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3202). The court below directed the jury to return a verdict in favor of the defendants, for the reason that the damages alleged in the complaint were not such damages as were contemplated by the act of Congress just mentioned.


The plaintiffs were engaged in the business of manufacturing combined churns and butter workers at Owatonna, Minn., and from there shipping and selling them in Minnesota and in other states. The defendant the Creamery Package Manufacturing Company, a corporation organized under the laws of Illinois, was also engaged in manufacturing and selling throughout the United States all kinds of dairy and creamery supplies and installing in creameries complete creamery outfits. The defendant the Owatonna Manufacturing Company, a corporation organized under the laws of Minnesota, was engaged in the manufacture of combined churns and butter workers. The defendant La Bare was president of the last-named corporation. The product of its plant was sold throughout the different states of the United States by the defendant the Creamery Package Manufacturing Company, pursuant to a contract hereafter referred to.

The record discloses that on the 2d of October, 1893, by an instrument in writing, Reuben B. Disbrow and Darius W. Payne, then owners of letters patent numbered 490,105, for a consideration, assigned said patent and the exclusive right to manufacture and sell throughout the United States and territories the Disbrow combined churn and butter worker covered by the patent, and also "all subsequent patents for improvements that may be made to it to the Owatonna Manufacturing Company"; that thereafter the Disbrow Manufacturing Company, a corporation organized under the laws of Minnesota, Reuben B. Disbrow being its

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president and Darius W. Payne its secretary, began the manufacture of certain churns called the Winner or New Disbrow. The defendant the Owatonna Manufacturing Company claimed that this churn was being manufactured under improvements which were patented by Reuben B. Disbrow after the 1893 agreement, and therefore belonged to the Owatonna Company as subsequent patents for improvements. At this time the defendant the Creamery Company had a contract, made in October, 1896, with the Disbrow Company for the sale of the winner churn. It had also advanced money to the Disbrow Company and held a mortgage upon its plant for \$800.

Litigation arose with respect to the rights of the parties under the agreement of 1893, and several suits were pending in relation thereto, when, in April, 1897, a settlement was effected by the execution of four instruments. One was a contract between the Disbrow Manufacturing Company and the Owatonna Manufacturing Company, in and by which the rights of all parties under the October, 1893, agreement were mutually released, the suits were settled, and the Disbrows sold their patents, machines, tools, and patterns to the Owatonna Manufacturing Company, and retired from the churn business during the life of the [117] patents. Another was an assignment of the Disbrow patents. A third was a contract between the Owatonna Manufacturing Company and the Creamery Package Manufacturing Company, by which the Creamery Package Manufacturing Company was made sales agent for all the churns manufactured by the Owatonna Manufacturing Company. The fourth was a contract between the Disbrow Manufacturing Company and the Creamery Package Manufacturing Company, whereby the agreement of October, 1896, between these parties was released and discharged and the mortgage on the plant of the Disbrow Manufacturing Company was satisfied, the Creamery Package Manufacturing Company agreeing to pay to the Disbrows royalties thereafter falling due from the Owatonna Manufacturing Company. These four contracts were executed at the same time, and, as shown by the recitals, were part of a single transaction.



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The purpose of these instruments, as disclosed by the instruments themselves, was to settle pending litigation and all matters concerning which the parties were at variance, and to cause the Disbrow Company to discontinue the manufacture of churns under the patents, which the Owatonna Manufacturing Company insisted belonged to it.

February 24, 1898, the defendant the Creamery Package Manufacturing Company and its stockholders entered into an agreement with a number of other concerns and persons engaged in the business of manufacturing and selling combined churns and butter workers and other creamery supplies. The purpose of this agreement, as stated by counsel for the defendant the Creamery Package Manufacturing Company in their brief, "was to advance the business interests of the different parties by settling and avoiding litigation pending and apprehended and by terminating unreasonable and ruinous competition." The defendant the Owatonna Manufacturing Company was not a party to this agreement, and, so far as the record shows, was not responsible for any act of the Creamery Package Manufacturing Company in carrying out its provisions. The only connection it had with the Creamery Package Manufacturing Company was by virtue of the provisions of its contract of April 19, 1897, with that company. That contract was not a contract in restraint of trade, nor was it an attempt to create a monopoly. As suggested by the trial court:

"It was merely a contract making the Creamery Package Manufacturing Company the sales agent of the Owatonna Manufacturing Company."

Even if it can be said that it incidentally or indirectly tended to restrain competition by giving the Creamery Package Manufacturing Company the exclusive right to sell its product, it would not violate the statute. As said by Judge Sanborn in *Union Pacific Coal Company v. United States*, 173 Fed. 737, 97 C. C. A. 581:

"If the necessary effect of a combination to engage in or conduct interstate or international commerce is but incidentally and indirectly to restrict competition therein, while its chief result is to foster the trade and to increase the business of those who make and operate it,

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it does not fall under the ban of this law." *Hopkins v. United States*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290; *Anderson v. United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300; *United States v. Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; *Addyston Pipe & Steel Company v. United States*, 175 U. S. [118] 211, 20 Sup. Ct. 96, 44 L. Ed. 136; *Whitwell v. Continental Tobacco Company*, 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689, and cases there cited.

The record shows that the Creamery Package Manufacturing Company was the assignee of three certain patents, numbered respectively 539,571, 565,720, and 600,168; that the Owatonna Manufacturing Company was the owner of another patent, numbered 585,100, for new and useful improvements in combined churns and butter workers; that on the 16th of July, 1904, these two defendants brought independent suits against the plaintiffs for infringements of their patents. In the case of the Owatonna Manufacturing Company's patent, the patent was decreed to be void for lack of invention in view of the prior art. In the case of the Creamery Package Manufacturing Company's patents it was decreed that it was the owner of the patents sued on, and that the patents had been infringed by the plaintiffs, an injunction was issued, and the case referred to a master for an accounting. It is upon the prosecution of these two patent suits that the plaintiffs base their right of action. They insist that their business and the property used in connection therewith was injured, and their interstate trade and commerce destroyed, first, by the prosecution by the two defendants against the plaintiffs of these two separate patent infringement suits; and, second, by the defendants circulating among the agents, users, purchasers, and prospective purchasers of their product, located in different states, reports and statements to the effect that the combined churns and butter workers were infringements of patents owned and controlled by the defendants.

As already indicated, we do not think the contract between the Owatonna Manufacturing Company and the Creamery Package Manufacturing Company, giving the Creamery Company the exclusive sale of the Manufacturing Company's output, tended to suppress competition. The Manufacturing

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Company had the right to select its customers, and to sell and to refuse to sell to whomsoever it chose (*Whitwell v. Continental Tobacco Company*, 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689), and the provision making the Creamery Company its sole sales agent was a usual and reasonable method of providing for the disposition of its product. The effect of this contract, if, indeed, it had any effect, upon interstate or international commerce, was only incidental and indirect. The sole purpose of the contract, as we view it, was to settle pending and threatened litigation, and to secure to the Owatonna Manufacturing Company the right to manufacture and dispose of its product under certain patents, and to foster its trade and increase its business. In order to condemn an agreement as void under the act of July 2, 1890, its dominant purpose must be an interference with interstate or international commerce. *Cincinnati, etc., Packet Company v. Bay*, 200 U. S. 179, 26 Sup. Ct. 208, 50 L. Ed. 428. The same is true of the agreement between the same parties of June 4, 1898, which was an agreement for the settlement of certain litigation, and provided that the Owatonna Manufacturing Company should have the right to manufacture 55 per cent of the total yearly sales made by the Creamery Company or be compensated in damages. This contract was merely supplemental to the contract of April 19, 1897, which contained no provision as to the amount of sales of the [119] Owatonna Manufacturing Company's product should be made by the Creamery Company, and this omission was supplied by this contract. Its only effect was to foster the interests of the Owatonna Manufacturing Company, and did not affect competition.

It is not necessary in the disposition of this case to determine the question whether or not the contract of February 24, 1898, between the Creamery Manufacturing Company and other concerns and individuals, to which the Owatonna Manufacturing Company was not a party, violated the provisions of the act of Congress. We may assume, however, for the purposes of this case, without deciding the question, that it was a contract in violation of the statute. We then have a case where two suits are brought, one by a party to a lawful agreement, the other by a party to an unlawful

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agreement, for the infringement of patents owned by them respectively, and where both parties were doing nothing more than exercising their legal rights. The mere fact that the Creamery Package Manufacturing Company was a party to an unlawful combination would not deprive it of the right to sue and recover damages against an infringer of patents owned by it, or to bring suit if it believed the patents were being infringed. As was said in *Strait v. National Harrow Company* (C. C.) 51 Fed. 819, the owner of a patent having a right to bring suit for its infringement:

"The motive which prompts him to sue is not open to judicial inquiry, because, having a legal right to sue, it is immaterial whether his motives are good or bad, and he is not required to give his reasons for the attempt to assert his legal rights." *Connolly v. Union Sewer Pipe Company*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, and cases there cited.

As suggested by the Circuit Court:

"There is no evidence which would justify a jury finding that the Owatonna Manufacturing Company entered into any agreement or contract with any one that was in violation of either section 1 or section 2 of the act, so that the Creamery Package Manufacturing Company cannot be held responsible for the failure of the Owatonna Manufacturing Company to maintain its action, and it cannot be held responsible, although it may have entered into an unlawful conspiracy with other persons, for it has not entered into any such conspiracy with the Owatonna Manufacturing Company."

The contract of February 24, 1898, between the Creamery Company and other concerns and individuals, contained no provision for the bringing of actions against alleged infringers of its patents for the purpose of driving them out of business, and there was certainly nothing of the kind in any of the contracts made and entered into between the defendants. The mere fact that the two infringement suits were brought upon the same day and the defendants were represented by the same counsel does not show, or even tend to show, that they were brought for any purpose other than the enforcement of the legal rights of the owners of the patents. It falls far short, it seems to us, of establishing an agreement or conspiracy between the defendants to bring these suits at the same time for the purpose of driving the plaintiffs out of business, and after a patient and thorough

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examination of the record we think the Circuit Court was fully justified in holding that there was no evidence offered at the trial "which would warrant the jury in finding that any agreement of that kind existed."

[120] As a second basis for the recovery of damages, the plaintiffs contend that the defendants circulated among the agents, users, purchasers, and prospective purchasers of the churns of the plaintiffs, located in different states, reports and statements that the combined churns and butter workers sold by the plaintiffs were infringements of the Disbrow patents owned or controlled by the defendants, and that they threatened to bring suits against the users of the plaintiffs' churn. That the owner of a patent may notify infringers of his claims, and warn them that, unless they desist, suits will be brought to protect him in his legal rights, is sustained by numerous decisions. *Kelley v. Ypsilanti Dress Stay Manufacturing Co.* (C. C.) 44 Fed. 19, 10 L. R. A. 686; *Computing Scale Company v. National Computing Scale Company* (C. C.) 79 Fed. 962; *Farguhar Company v. National Harrow Company*, 102 Fed. 714, 42 C. C. A. 600, 49 L. R. A. 755; *Adriance, Platt & Co. v. National Harrow Company*, 121 Fed. 827, 58 C. C. A. 163; *Warren Featherbone Company v. Landauer* (C. C.) 151 Fed. 130; *Mitchell v. International, etc., Company* (C. C.) 169 Fed. 145; 30 Cyc. 1054.

The only limitation on the right to issue such warnings is the requirement of good faith. There is nothing in the warnings given in this case to show that the letters or notices were false, malicious, offensive, or opprobrious, or that they were used for the willful purpose of inflicting injury. In such a case it was said, in *Kelley v. Ypsilanti, supra*:

"It would seem to be an act of prudence, if not of kindness, upon the part of a patentee, to notify the public of his invention, and to warn persons dealing in the article of the consequence of purchasing from others." *Chase v. Tuttle* [C. C.] 27 Fed. 110; *Boston Dietite Company v. Florence Manufacturing Company*, 114 Mass. 69 [19 Am. Rep. 310]; *Kidd v. Horry*, 28 Fed. 773.

There is nothing in this case to indicate that any of the warnings issued by the defendants were made in bad faith, and they were promptly followed by the institution of the



**Syllabus.**

infringement suits. In issuing notices and warnings we think the defendants were acting within their legal rights. If they had the right to bring the suits, they had the right to issue the warnings. It may be, and probably is, true that the pendency of these suits resulted in some damage to the plaintiffs by lessening the sale of the challenged device; but such damage was an incident of the suits, and cannot be made the basis of a recovery.

The conclusion reached is that the Circuit Court properly directed the jury to return a verdict for the defendants, and the judgment is affirmed.

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**[946] IN RE KITTLE.**

(Circuit Court, S. D. New York. July 23, 1910)

[180 Fed. Rep., 946.]

**GRAND JURY (§ 33)—SUPERVISION—EVIDENCE.**—The evidence that shall be received before a grand jury is not subject to judicial control.\*

[Ed. Note.—For other cases, see Grand Jury, Dec. Dig. § 33.]

Review by trial court, of evidence given before grand jury, see note to *McGregor v. United States*, 69 C. C. A. 488.]

**GRAND JURY (§ 36)—SUPERVISION—WITNESSES.**—That a witness called to testify before a grand jury is interrogated with reference to an offense against the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), which is the subject of a crime and of an offense laid in an existing indictment, does not confer on the witness a privilege to refuse to testify, as an answer when given is a complete bar to the pending prosecution, or any further prosecution for the offense, if it be pertinent to the subject-matter.

[Ed. Note.—For other cases, see Grand Jury, Dec. Dig. § 36.]

**WITNESSES (§ 304)—SELF-INCRIMINATING TESTIMONY—PRIVILEGE OF WITNESS.**—The constitutional privilege of a witness against incrimination can not be claimed, if all prosecution is barred from the date of the testimony, regardless of whether he has been indicted or not.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 304.]

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## Opinion of the Court.

CRIMINAL LAW (§ 42)—PRIVILEGE—IMMUNITY—SHERMAN ACT.—The provision of the act granting immunity to a witness testifying to violations of the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) is not retroactive the constitutional guaranty being satisfied by a construction that the witness is not subject to future prosecution after giving his testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 45-48; Dec. Dig. § 42.]

In the matter of Charles Kittle. Petition to relieve petitioner from examination. Denied.

*Joline, Larkin and Rathbone*, for petitioner.

*Felix Frankfurter*, Asst. U. S. Dist. Atty.

HAND, District Judge.

The first point of the petitioner is certainly not valid. I cannot say what the purposes of the grand jury are in this inquiry. The mere fact that the names in each indictment are the same is of no consequence whatever. The same defendants may very well have committed two crimes, even two crimes against [947] the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). Since the proceedings of the grand jury are not open to scrutiny, and certainly will never become so, so far as I can lawfully prevent, I cannot say that they are about to indict the same defendants for the same offense. Nor, even if I could, should I try to interfere with their proceedings. Their bills are at most only accusations, and when they are found the courts will deal justly with the defendants and prevent their being twice harried.

One purpose of the secrecy of the grand jury's doings is to insure against this kind of judicial control. They are the voice of the community accusing its members, and the only protection from such accusation is in the conscience of that tribunal. Therefore, except in sporadic and ill-considered instances, the courts have never taken supervision over what evidence shall come before them, and, with certain not very well-defined exceptions, they remain what the Grand Assize

## Opinion by the Court.

originally was, and what the petit jury has ceased to be, an irresponsible utterance of the community at large, answerable only to the general body of citizens, from whom they come at random, and with whom they are again at once merged. A court shows no punctilious respect for the Constitution in regulating their conduct. We took the institution as we found it in our English inheritance, and he best serves the Constitution who most faithfully follows its historical significance, not he who by a verbal pedantry tries a priori to formulate its limitations and its extent. So much for the first point.

The second point is of the scope of the immunity clause in the Sherman act. The argument is that, since the immunity prescribed by the act includes prosecution, it is too late to question any one after he has been indicted, because part of the consideration for his testimony has already been taken from him. All this rests upon the assumption that I must infer that the present inquiry relates to the subject-matter of the present indictment, and that I should not have the right to do till the questions were asked. However, as in all probability they do relate to that subject-matter, I may as well dispose of it now, though out of order, and so obviate at least some of the constant recourse to the court. Therefore I shall assume that the inquiry is of the subject-matter of some crime, and, indeed, of the crime laid in the existing indictment. When so questioned, the witness must answer. *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819. And, when given, his answer will thereafter protect him from further prosecution. It will be a good bar to this very pending prosecution, if it be pertinent to the subject-matter.

The petitioner's theory goes further than this, and requires that the government should elect at the outset whether the person is to be witness or defendant, and, having once elected, that it should remain consistent. We must remember at the outset that the question raised has nothing whatever to do with the constitutional privilege against incrimination, because that privilege could not be claimed, if all prosecution were barred from the date of the testimony (*Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819), re-

## Syllabus.

ardless of whether the witness had already been indicted or not. The only necessary protection is that by no peradventure could the disclosure result in conviction (Mr. Justice Day, obiter, in *Heike v. United States*, 217 U. S. 425, 431, 30 Sup. Ct. 439, 54 L. Ed. 821), and to provide against that possibility it was enough to forbid any future criminal proceedings as soon as the testimony came out.

The question is, therefore, of the meaning of the statute, not of the scope of the Constitution. Is there any ground for saying that the bargain with the witness is, as it were, retroactive, so that he cannot get his quid pro quo by testifying, if he has already been indicted? I think not. As I have said, the statute would be constitutionally broad enough, if it forbade any future prosecution, and its scope is fairly inferable from its purpose. As the purpose was only to compel such testimony, and the Constitution was satisfied by the more limited construction, the fairer interpretation of the will of Congress is that it went no further than it had to go, and that they meant to give only a future immunity. No one has found any authority upon the question, but I think there can be small doubt of the correctness of this construction.

The petition is denied, and the petitioner directed to be sworn at 2 o'clock on Tuesday, July 26, 1910.

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[267] *HALE v. O'CONNOR COAL & SUPPLY CO., INC., ET AL.*

(Circuit Court, D. Connecticut. June 15, 1908.)

[181 Fed. Rep., 237.]

**MONOPOLIES (§ 28)—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE—ACTION FOR DAMAGES—SUFFICIENCY OF COMPLAINT.—**

The complaint, in an action under Sherman Anti-Trust Act July 2, 1890, § 7, c. 647, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), to recover damages for injuries to plaintiff's business caused by an alleged combination and conspiracy between defendants in restraint of interstate trade and commerce and to monopolize such commerce, considered, and *held* sufficient on demurrer.\*

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 28.]

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## Statement of the Case.

Action by Charles R. Hale against the O'Connor Coal & Supply Company, the Hatch & North Coal Company, the Hartford Coal Company, W. C. Mason & Co., Incorporated, the Robert Price Company, the Tunnel Coal Company, William H. Foster, William W. Frayer, and Mary E. Frayer, copartners as Frayer & Foster, Reinhold Hakewessell and Grant U. Kierstead, copartners as the City Coal Company, Albert D. Goldberg, Harris I. Sack, and John Sack, copartners as the North End Coal & Feed Company, George W. Newton, and Charles W. Newton, copartners as George W. Newton & Son, Don O'Connor, Albert P. Day, Frederick S. Belden, Holman Goldberg, Isidore E. Goldberg, and William E. Miller. On demurrer to complaint. Overruled.

The following is the substantial part of the complaint:

## FIRST COUNT.

1. Since the month of October, 1903, the plaintiff has been, and still is, engaged in interstate commerce as a retail coal dealer in said city of Hartford; his business consisting of buying coal mined in states other than the state of Connecticut, causing said coal to be brought to said state of Connecticut, and selling said coal at retail in said city of Hartford.

2. During the whole of said time the defendants the Hatch & North Coal Company, the Hartford Coal Company, the Tunnel Coal Company, Incorporated, William H. Foster, Mary E. Frayer, Reinhold Hakewessell, Grant U. Kierstead, Abraham D. Goldberg, Harris I. Sack, John Sack, George W. Newton, Charles W. Newton, Holman Goldberg, Isidore E. Goldberg, and William [268] H. Miller, and each of them, have been engaged in the business of buying coal mined in states other than Connecticut, causing said coal to be brought to the state of Connecticut, and selling said coal at retail in said city of Hartford.

3. Said the Robert Price Coal Company, Incorporated, has been engaged in said business since about the month of April, 1904, said the O'Connor Coal & Supply Company, Incorporated, since October, 1904, said W. C. Mason & Company, Incorporated, since January, 1906, and said William W. Frayer since about the month of January, 1906.

4. Said William W. Frayer was engaged in said business from October, 1903, until about the month of January, 1906, as agent and manager for said William H. Foster and Mary E. Frayer.

5. Said Robert Price was engaged in said business from October, 1903, until about the month of April, 1904, and since that time has been, and still is, the president of said the Robert Price Coal Company, Incorporated.

## Statement of the Case.

6. Said Don O'Connor, since October, 1904, has been, and still is, engaged in said business as president of said the O'Connor Coal & Supply Company, Incorporated.

7. Since October, 1903, said Albert P. Day has been, and still is, engaged in said business as president of said the Hatch & North Coal Company, and said Frederick S. Belden, as president of said the Hartford Coal Company.

8. At all times since the month of May, 1904, until the date of this complaint, such of the defendants as were engaged in the retail coal business as above set forth have wrongfully, unlawfully, and contrary to the act of Congress in such case made and provided, combined and conspired in restraint of trade and commerce among the several states with the purpose and intent of preventing and restraining the plaintiff from purchasing coal mined in states other than Connecticut, from causing coal to be brought to said state of Connecticut, and from selling coal in said city of Hartford.

9. In pursuance of said combination and conspiracy, said defendants, personally and through their agents, have endeavored, and still endeavor, to cause wholesale dealers in coal in Connecticut and other states to refuse to sell and deliver coal to said plaintiff. Among said wholesale dealers are the Benedict & Pardee Company, Benedict, Downs & Co., Incorporated, and Williams, Wells & Co., all of New Haven, in the state of Connecticut, Percy Hellner & Son, Madelra, Hill & Co., and Peale, Peacock & Kerr, all of the city and State of New York, Weston, Dodson & Co. of Bethlehem in the state of Pennsylvania, and the Connecticut Coal Company and Frank Miller & Co., both of Bridgeport in the state of Connecticut.

10. By the said efforts of the defendants many of said wholesale coal dealers were induced to refuse, and did refuse, to sell coal to the plaintiff, including all the wholesale coal dealers above named except said Frank Miller & Co.

11. By reason of said combination and conspiracy and the acts of the defendants above set forth, the plaintiff has been at various times unable to secure coal to sell to his customers in said Hartford, and has thereby been prevented from making sales to said customers, and has wholly lost the profits which would otherwise have accrued from such sales.

12. By reason of said combination and conspiracy and the acts of the defendants above set forth, the plaintiff has been at various times delayed in securing coal, and has thereby been prevented from making sales to his said customers and has wholly lost the profits which would otherwise have accrued from such sales.

13. By reason of said combination and conspiracy and the acts of the defendants above set forth, the plaintiff has been at various times delayed in securing coal, and has by reason of said delay been obliged to pay for said coal a price higher than he would otherwise have paid, to his great loss and damage.

**Statement of the Case.**

14. By reason of said combination and conspiracy and the acts of the defendants above set forth, the plaintiff has been put to great expense and has been compelled to spend much time in securing coal to sell to his said customers in said city of Hartford.

15. In pursuance of said combination and conspiracy, said defendants, personally and through their agents, have circulated in said city of Hartford [269] false and malicious reports with regard to the financial condition of the plaintiff, with regard to his ability to deliver coal to his said customers, and with regard to the quality of the coal sold by him.

16. In consequence of the wrongful acts of the defendants above set forth, the plaintiff has lost many of his said customers and much of his trade and business and suffered great injury in his business.

17. By reason of the said combination and conspiracy and the acts of the defendants above set forth, the rights of the general public in said city of Hartford and elsewhere have been injuriously affected and interstate commerce impeded and prevented.

18. By reason of the said combination and conspiracy and the wrongful acts of the defendants above set forth, the plaintiff has suffered loss and damage to the amount of \$12,000.

**SECOND COUNT.**

1. Paragraphs 1, 2, 3, 4, 5, 6, and 7 of the first count are hereby made part of this count.

2. At all times since the month of May, 1904, such of said defendants as were engaged in the retail coal business as above set forth, wrongfully, unlawfully, and contrary to the act of Congress in such case made and provided, have combined and conspired to monopolize the trade and commerce in said city of Hartford in coal mined in states other than the state of Connecticut.

3. Paragraphs 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18 of the first count are hereby made part of this count.

**THIRD COUNT.**

1. Paragraphs 1, 2, 3, 4, 5, 6, and 7 of the first count are hereby made part of this count.

2. At all times since the month of May, 1904, such of the defendants as were engaged in the retail coal business as above set forth have maintained an organization known as the Hartford Coal Dealers' Exchange for the purpose of establishing and maintaining the prices for coal in said Hartford, and, because the plaintiff would not maintain the prices of coal charged by him to his customers in accordance with the scale of prices established as aforesaid, said defendants wrongfully, unlawfully, and contrary to the act of Congress in such case made and provided, combined and conspired in restraint of trade

## Statement of the Case.

and commerce among the several states with the purposes and intent of preventing and restraining the plaintiff from purchasing coal mined in states other than Connecticut, from causing coal to be brought to said state of Connecticut, and from selling coal in said city of Hartford.

3. Paragraphs 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18 of the first count are hereby made part of this count.

The plaintiff claims \$36,000 damages by force of the act of Congress in such case made and provided, the same being threefold the damage by him sustained, together with the costs of suit and a reasonable attorney's fee.

## Defendants filed the following demurrer:

1. It does not appear in the first count of the complaint that the plaintiff at any of the times referred to in said first count was or is engaged in interstate commerce.

2. It does appear from the first count of the complaint that a large part of the plaintiff's business consisted in the sale of coal at retail in the city of Hartford and the purchase of coal from the wholesale dealers in the state of Connecticut; and it does not appear that the plaintiff's transactions with wholesale dealers in other states, if any, constituted any substantial or material portion of the plaintiff's business.

3. It is not alleged in said first count that the plaintiff ever had any dealings with wholesale dealers in states other than the state of Connecticut.

4. It does not appear from said first count what was the character of the plaintiff's transactions with dealers in other states, if any; so that it can be determined whether said transactions were or were not operations in interstate commerce so far as the plaintiff is concerned.

[270] 5. It does not appear from said first count that the combination and conspiracy therein alleged was a combination and conspiracy in restraint of trade and commerce among the several states or with foreign nations.

6. The above-named defendants demur to paragraph 9 of the first count of the complaint because it does not appear that the acts of the defendants therein alleged were in pursuance of a combination and conspiracy in restraint of interstate commerce.

7. Defendants demur to paragraph 10 of the first count of the complaint because it is not alleged and does not appear from the complaint that the alleged refusal of said wholesale coal dealers to sell coal to the plaintiff was the result or consequence of a combination and conspiracy in restraint of interstate commerce on the part of the above-named defendants.

8. The above-named defendants demur to paragraph 11 of the first count of the complaint because it is not alleged therein and does not appear from the complaint that plaintiff's alleged inability to secure



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coal to sell to his customers in Hartford was the result or consequence of a combination and conspiracy in restraint of interstate commerce on the part of the above-named defendants.

9. The above-named defendants demur to paragraphs 12 and 13, and each of them, because it is not alleged therein and does not appear from the complaint that the alleged delay in securing coal was the result or consequence of a combination and conspiracy in restraint of interstate commerce on the part of the above-named defendants.

10. Paragraph 14 of the first count of the complaint is demurred to because it is not alleged therein and does not appear from the complaint that the alleged expense and expenditure of time were the result or consequence of a combination and conspiracy in restraint of interstate commerce on the part of the above-named defendants.

11. Paragraph 15 of the first count of the complaint is demurred to because it does not appear from the complaint that the alleged false and malicious reports were made in pursuance of a combination and conspiracy in restraint of interstate commerce on the part of the above-named defendants.

12. Paragraph 16 of the first count of the complaint is demurred to because it does not appear from the complaint that plaintiff's alleged loss of trade and injury were the result or consequence of a combination and conspiracy in restraint of interstate commerce on the part of the above-named defendants.

13. Paragraph 17 of the first count of the complaint is demurred to because it is not alleged therein and does not appear from the complaint how the rights of the general public in said city of Hartford have been injuriously affected, or how and in what measure interstate commerce has been impeded and prevented.

14. Paragraph 18 of the first count of the complaint is demurred to because it does not appear from the complaint that the plaintiff's alleged loss and damage is the result or consequence of a combination and conspiracy in restraint of interstate commerce on the part of the above-named defendants.

DEMURRER TO SECOND COUNT.

1. All the paragraphs of the demurrer to the first count are hereby made part of the demurrer to the second count.

2. The above-named defendants demur to the second count of the complaint because it appears therefrom that the alleged combination and conspiracy to monopolize trade and commerce is a conspiracy to monopolize trade and commerce in the city of Hartford, and is not a conspiracy to monopolize any part of the trade or commerce among the several states or with foreign nations.

DEMURRER TO THIRD COUNT.

1. All the paragraphs of the demurrer to the first count are hereby made part of the demurrer to this count.

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2. The above-named defendants demur to the third count of the complaint because it does not appear therefrom that the combination and conspiracy alleged therein was or is a combination and conspiracy in restraint of trade and commerce among the several states.

[271] *J. H. Peck* and *R. M. Grant*, for plaintiff.

*J. Gilbert Calhoun, Hyde, Joslyn, Gilman and Hungerford, Robinson and Robinson, Bill and Tuttle, and John J. Dwyer*, for defendants.

PLATT, District Judge.

Starting with the decision of the Circuit Court of Appeals for the Sixth Circuit in *City of Atlanta v. Chattanooga Foundry & Pipe Works*, 127 Fed. 23, 61 C. C. A. 387, 64 L. R. A. 721, as the foundation, this complaint has been examined at leisure and with due care. If any doubt could have been entertained after reading the words of the distinguished writer in that case, it has, to my mind, been dissipated by the later expressions delivered by the higher federal courts.

As things now stand, it would be flying in the face of the higher powers, with a vengeance, to accept as valid any of the criticisms launched against the complaint. If the facts therein alleged can be sustained by proof, a case will be presented which will invoke the aid of a federal, rather than a state, court. The situation is so absolutely one-sided as to satisfy me that no good purpose would be subserved by an extended discussion and citation of authorities.

Let the demurrers, one and all, be overruled.

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[706] CLABAUGH *v.* SOUTHERN WHOLESALE  
GROCERS' ASS'N ET AL.

(Circuit Court, N. D. Alabama, S. D. September 15, 1910.)

[181 Fed. Rep., 706.]

Torts (§ 22)—JOINT WRONGDOERS—SATISFACTION.—Where two parties are jointly responsible to a third party for one wrong, while the wronged party may sue either or both, and recover judgments

Opinion of the Court.

against either or both, he can have but one satisfaction for the same wrong.\*

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 29; Dec. Dig. § 22.]

ACCORD AND SATISFACTION (§ 3)—CONSTRUCTION AND OPERATION—SETTLEMENT WITH ONE OF TWO JOINT WRONGDOERS.—Plaintiff brought suit in a state court against the president of a wholesale grocers' association to recover damages for an alleged wrongful interference with his business. He subsequently commenced an action in a federal court against the association to recover damages for the same injury, alleged to have been caused by a conspiracy in restraint of trade, in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200). Pending such action he settled the suit in the state court, and received payment of the agreed sum from the defendant therein. *Held*, that such settlement was an accord and satisfaction of his entire claim, and a bar to the second suit, and that, not being entitled to recover actual damages in such suit, he was not entitled to recover the threefold damages or attorney's fees provided for by section 7 of the act.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 22-31; Dec. Dig. §3.]

Action by Hinton G. Clabaugh against the Southern Wholesale Grocers' Association and others. On motion by defendant for direction of verdict. Motion sustained.

*Campbell and Johnston*, for plaintiff.

*Wright and Wright, Caruthers Ewing, and Cabaniss and Bowie*, for defendant.

GRUBB, District Judge.

This is a suit instituted by Mr. Clabaugh against the Southern Wholesale Grocers' Association, a corporation, for damages to his business, alleged to have been caused by interference with it by the Southern Wholesale Grocers' Association by preventing the manufacturers from selling goods to him, by him to be sold to retailers. The action was brought under what is known as the "Sherman Anti-Trust Law," enacted by the Congress of the United States. Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200). Whether there has been a violation of that act by the Southern Wholesale Grocers' Association is not necessary, in my

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## Opinion of the Court.

judgment, to be determined in this case, for the reason that the defendant has pleaded that, conceding that there was any violation of the act which entitles the plaintiff to damages, the plaintiff in this case has, before the trial, settled for those damages with another party, who is jointly liable with this defendant.

Before I enter on the facts, I might say that it is a well-recognized principle of law that where two parties are jointly responsible to a [707] third party for one wrong, while that third party, the wronged party, can sue either or both, and get judgments against either or both, he can get but one satisfaction for the same wrong. Otherwise he would be getting paid twice. So, if he has been paid by one wrongdoer his full damages, then he has no right to look to the other wrongdoer for any damages, even though that wrongdoer was jointly responsible with the one who pays.

In this case the plaintiff, Mr. Clabaugh, sued in the state court Mr. James A. Van Hoose, who was president of the association, which is now defendant in this court, alleging that these same acts of interference which broke up his business, as he claims, were done by Mr. Van Hoose as president of this same association. Of course, if the president did them, he would be liable personally, because he could not do wrong for his principal, and not be responsible for that wrong himself. Therefore he would be responsible, and he would also make his principal responsible, if he acted within the scope of his authority as president. Therefore it may be said, for the sake of argument, that both of them were responsible for the wrongs that have been charged in the state court in the suit against Mr. Van Hoose, which, as I construe it, are the same exactly as Mr. Clabaugh here sues for, and for which he asks damages against the Southern Wholesale Grocers' Association.

Now, after the suit had been brought in the state court, and after there had been a trial, which resulted in a disagreement of the jury, Mr. Clabaugh and Mr. Van Hoose came to an agreement which is represented by the documents which have been presented here to settle that case. This agreement provided for the payment of \$10,000 by Mr. Van Hoose, stipu-

## Opinion of the Court.

lating that, if all the money was not paid by a certain date, a judgment should be entered for that amount in the circuit court, a jury being waived. Had that judgment been rendered according to agreement, it would have been a full satisfaction of the wrongs complained of in that case. The agreement providing for that method of remedy, I think it is a fair construction of the agreement that the parties intended, in settling the case, to settle Mr. Clabaugh's full damages against Mr. Van Hoose—the full damages for the injuries alleged in the complaint against Mr. Van Hoose.

Giving the agreement that construction, Mr. Clabaugh had no right to sue anybody else, even though he attempted to reserve that right in his agreement with Mr. Van Hoose, because, having once been paid in full for his damages, he had not the legal right to make any agreement which would give him a right to sue any other person for the same damages, upon the idea that a man cannot recover twice for the same damages, and that if one wrongdoer pays him in full he has no right to look to the other, even though he seeks to reserve that right in the agreement with the party who pays. In this case the agreement of settlement was in writing, and it is the duty of the court to construe it. The court construes it as constituting an accord and satisfaction of the damages Mr. Clabaugh claimed in the Van Hoose suit in the circuit court. That being true, the law makes the same agreement and its full performance by Mr. Van Hoose a full accord and satisfaction of the cause of action sued on by Mr. Clabaugh against [708] the association in this case. Therefore the plea is made out by the undisputed evidence, the documents in the case.

It is true Mr. Clabaugh said he did not agree that the costs paid him by Mr. Van Hoose were the full costs; but I think he cannot be heard to say this after he took the check and paid the clerk, and the clerk received it without objection, and he made no further demand until after this trial was entered upon. I think he is to be treated as having accepted that as performance of the agreement, whether it was full performance or not. So the verdict in this case should be for the defendant, on the idea that the cause of

## Syllabus.

action, conceding it existed, has been settled by Mr. Clabaugh's receipt of \$10,000 from Mr. Van Hoose, which I construe to have been received by him in full satisfaction of the damages he claimed in the suit against Mr. Van Hoose, and which are the same damages he claims in this suit.

There is one other thing which I should have said. The act of Congress under which this suit is brought provides for the recovery, not of single damages, but threefold damages; but the construction of that act by the Supreme Court in the case of *Montague & Co. v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608, is to the effect that threefold damages are only recoverable when the plaintiff has a cause of action that would entitle the jury to award single damages. In other words, the function of the jury is to only render a judgment for actual damages, and the court then triples them; but if there is nothing to go to the jury for single damages, then the court has no jurisdiction to render any judgment for triple damages. And the same is true as to the attorney's fees. I think they are merely an incident to a judgment for the plaintiff. If no such judgment is obtained, then there can be no allowance for attorney's fees, though the settlement was made after this suit was commenced.

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[601] UNITED STATES *v.* KISSEL AND HARNED.\*

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE  
SOUTHERN DISTRICT OF NEW YORK.

No. 390. Argued November 10, 11, 1910.—Decided December 12, 1910.

[218 U. S., 601.]

Under the Criminal Appeals Act of March 2, 1907, c. 2504, 34 Stat. 1246, when the indictment is quashed this court is confined to a consideration of the grounds of decision mentioned in such statute. *United States v. Ketel*, 211 U. S. 370, and there is a similar limit

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\* For opinion of Circuit Court (173 Fed. Rep., 823). See *ante* p. 744.

**Syllabus.**

when the case comes up from a judgment sustaining a special plea in bar.\*

Although mere continuance of result of a crime does not continue the crime itself, if such continuance of result depends upon continuous cooperation of the conspirators, the conspiracy continues until the time of its abandonment or success.

A conspiracy in restraint of trade is more than a contract in restraint of trade; the latter is instantaneous, but the former is a partnership in criminal purposes and as such may have continuance in time; and so held in regard to a conspiracy made criminal by the Anti-trust Act of July 2, 1890.

Whether the indictment in this case charges a continuing conspiracy with technical sufficiency is not before the court on the appeal taken under the Criminal Appeals Act of March 2, 1907, from a judgment sustaining special pleas of limitation in bar.

Allegations in the indictment consistent with other facts alleged that a conspiracy continued until the date of filing must be denied under the general issue and cannot be met by special plea in bar.

This court, having on an appeal under the Criminal Appeals Act of March 2, 1907, held that allegations as to continuance of a conspiracy cannot be met by special plea in bar, all defenses, including that of limitations by the ending of the conspiracy more than three [602] years before the finding of the indictment, will be open under the general issue and unaffected by this decision.

173 Fed. Rep. 823, reversed.

[54 L. ed., 1168.]<sup>b</sup>

1. The only question before the Federal Supreme Court on an appeal taken under the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1909, p. 220), from a judgment sustaining a special plea in bar when the defendant has not been put in jeopardy, is whether such plea in bar can be sustained.

2. A conspiracy to restrain or monopolize trade, in violation of the Sherman Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), by obtaining control of a competitor through a pledge of a majority of its stock to secure a loan to a stockholder, and then voting to suspend business until further order of the board of directors, continues, so far as the statute of limitations is concerned, so long as any further action is taken in furtherance of the conspiracy.

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<sup>b</sup> Paragraphs following comprise syllabus to this case in Vol. 54, p. 1168, Lawyers Edition. Copyrighted, 1911, by The Lawyers' Co-Operative Publishing Company.

## Argument for Defendant in Error.

3. A special plea of the statute of limitations is not good as against an indictment charging a conspiracy to restrain or monopolize trade, in violation of the Sherman Act of July 2, 1890, by improperly excluding a competitor from business, although the conspiracy is alleged to have been formed on a specified date, which was more than three years before the finding of the indictment, where such indictment, consistently with the other facts, alleges that the conspiracy continued to the date of its presentment.

The facts are stated in the opinion.

*Mr. Assistant Attorney General Fowler* for the United States. A brief which had been prepared by the late *Mr. Solicitor General Bowers* was filed for the United States.

*Mr. Leavitt J. Hunt* and *Mr. Geo. W. Betts, Jr.*, filed a brief for defendant in error, Harned. *Mr. Joseph H. Choate* and *Mr. William D. Guthrie*, with whom *Mr. Howard S. Gans* and *Mr. William C. Osborn* were on the brief, for the defendant, Kissel, in error:

Conspiracy is a non-continuous crime, and an indictment which charges its commission on a date barred by the statute of limitations charges an outlawed offense and is not saved by an allegation of continuance within the limitation. *United States v. Irvine*, 98 U. S. 450.

Where an indictment charges a crime which is not essentially continuous with a *continuando*, the *continuando* may be disregarded and the indictment treated as charging no more than the commission of the offense on the first day. Wharton's *Crim. Pl. & Pr.*, 9th ed., § 125; 1 Bishop's *New Crim. Proc.*, § 388; Starkey's *Crim. Pl.*, 1st Am. ed., 60, 61; *King v. Dixon*, 10 Mod. 335, 337; *United States v. La Coste*, 2 Mason, 129; *People v. Adams*, 17 Wend. 475, 476; *Wells v. Commonwealth*, 12 Gray, 326; *State v. Nichols*, 58 N. H. 41; *Cook v. State*, 11 Georgia, 53, 56; *State v. Briggs*, 68 Iowa, 416; *State v. Thompson*, 31 Utah, 228; *State v. Jasper*, 15 N. Car. 323.

At common law and under the Sherman Act, the offense of conspiracy is complete; the crime is actually committed when the design or intent is followed by the [603] act of agreeing or confederating; it is the bare act of agreeing alone that constitutes the crime. Archibold's *Crim. Pl.*, 22d ed., 1209; 2 Bishop's *New Crim. Law*, §§ 171; *United States v.*



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*Hirsch*, 100 U. S. 33; *United States v. Britton*, 108 U. S. 199, 204; and see *Pettibone v. United States*, 148 U. S. 197, 202; *Dealy v. United States*, 152 U. S. 539, 547; *Bannon v. United States*, 156 U. S. 464, 468; *Williams v. United States*, 207 U. S. 425, 447; *United States v. Donau*, 11 Blatchf. 168; *State v. Buchanan*, 5 H. & J. (Md.) 317, 355; *People v. Mather*, 4 Wend. 229, 264; *O'Connell v. The Queen*, 11 C. & F. 155, 233; *Mulcahy v. Reg.*, L. R. 3 H. L. Cas. 306, 317; *Commonwealth v. Judd*, 2 Massachusetts, 329, 337; *People v. Flack*, 125 N. Y. 324, 332.

But many crimes, which are non-continuous, are by their nature subject to renewal, and in such case, each renewal of the act constituting the gravamen of the offense constitutes a new crime. It is the nature of the act constituting the offense that determines its continuous or non-continuous nature. *State v. Poyner*, 134 N. Car. 609; Wharton's Crim. Law, 10th ed., § 27; *State v. Prescott*, 33 N. H. 212, 214; *State v. Thompson*, 31 Utah 228, 231; *State v. Briggs*, 68 Iowa, 416, 419; *Matter of Neilsen*, 131 U. S. 176; *In re Snow*, 120 U. S. 274; *Gise v. Commonwealth*, 31 P. F. Smith (Pa.), 428; *Cook v. State*, 11 Georgia, 53, 56; *People v. Flatherty*, 162 N. Y. 532, 538.

The results which flow from conspiracy, i. e., the acts done in pursuance of it, form no part of the offense; but a compact which does not contain within itself all the elements of wrong will not be rendered indictable by the criminality of acts done in furtherance of it. *United States v. Britton*, 108 U. S. 199; *McKenna v. United States*, 127 Fed. Rep. 88; *Salla v. United States*, 104 Fed. Rep. 544; *Conrad v. United States*, 127 Fed. Rep. 798.

Acts done in pursuance of a conspiracy, and in furtherance of it, are so far from being a part of the offense that [604] if criminal they constitute separate crimes, and a conviction or acquittal on either the conspiracy or the separate crime is no bar to a prosecution for the other offense. *Berkowitz v. United States*, 93 Fed. Rep. 452, 457; *Davis v. People*, 22 Colorado, 1, 3; *State v. Sias*, 17 N. H. 558; *Bailey v. State*, 42 Tex. Crim. Rep. 289, 291; *Whitford v. State*, 24 Tex. Ct. of App. Rep. 489, 493; *Wallace v. State*,

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41 Florida, 547, 557; *Wilcox v. United States*, 103 S. W. Rep. 774, 776; *Matter of Neilsen*, 131 U. S. 176, 186.

A conspiracy is a renewable offense, and it is renewed whenever two or more persons animated by a corrupt intent consciously participate in any act in furtherance of that intent. While those who enter upon a conspiracy may secure immunity for their criminal acts after a lapse of three years if they do nothing further within the three years, those who persist in their original purpose and seek by co-operative action to carry it into effect incur a liability each time they commit the offense of conspiring. The Government's theory that conspiracy is a continuous crime, would have every incentive to cause the conspirator who had once embarked to continue in his criminal course and not to desist or abstain therefrom. *Matter of Neilsen*, 131 U. S. 176; *In re Snow*, 120 U. S. 274.

That the offense is renewable and not continuing, see *Ware v. United States*, 154 Fed. Rep. 577; *S. C.*, 207 U. S. 588; *United States v. Jones*, 162 Fed. Rep. 417; *Jones v. United States*, 179 Fed. Rep. 584, 610; *United States v. Biggs*, 157 Fed. Rep. 264; *United States v. Bradford*, 148 Fed. Rep. 413; *S. C.*, 152 Fed. Rep. 616; *United States v. Greene*, 115 Fed. Rep. 343, 349, 350; *S. C.*, 154 Fed. Rep. 401; *Lorenz v. United States*, 24 App. D. C. 337, 387; *S. C.*, 196 U. S. 640; *Arnold v. Weil*, 157 Fed. Rep. 429, 430; *Ex parte Black*, 147 Fed. Rep. 832, 838; *S. C.*, 160 Fed. Rep. 431; *United States v. Greene*, 100 Fed. Rep. 941, 946; *United States v. Barber*, 157 Fed. Rep. 889, 890; *United States v. Trans-Missouri Freight Assn.*, 166 U. S. [605] 290, and *United States v. McAndrews & Forbes Co.*, 149 Fed. Rep. 823, are not incompatible with this view. *Northern Securities Co. v. United States*, 193 U. S. 197, and *Loewe v. Lawlor*, 208 U. S. 274, do not sustain the proposition that parties can render themselves liable to be punished criminally under the Sherman Act without doing any act whatever. And see *People v. Mather*, 4 Wend. 229; *Ochs v. The People*, 25 Ill. App. 379; *aff'd* 124 Illinois, 399; *Noyes v. State*, 41 N. J. L. 418; *Commonwealth v. Bartilson*, 85 Pa. St. 482, 486.

## Opinion of the Court.

In the light of these authorities, it is submitted that the sound doctrine is that the crime of conspiracy is not an essentially continuous offense, but that it is subject to renewal and that the renewal may be evidenced by the conscious participation of any of the conspirators in acts done for the purpose of effecting the object of the original conspiracy.

*Mr. Joseph H. Choate, Mr. DeLancy Nicoll, Mr. John M. Bowers and Mr. John D. Lindsay* submitted a brief by leave of the court on behalf of certain parties joined with defendants in error in this prosecution.

Mr. Justice HOLMES delivered the opinion of the court.

This is a writ of error brought by the United States to reverse a judgment of the Circuit Court sustaining pleas in bar pleaded to an indictment by the defendants in error. 173 Fed. Rep. 823. The first count of the indictment alleges that the defendants in error and others named, on December 30, 1903, and from that day until the day of presenting the indictment (July 1, 1909), have engaged in an unlawful conspiracy in restraint of trade in refined sugar among the several States of the Union, that is to say, to eliminate free competition and prevent all competition with the American Sugar Refining Company, [606] one of the defendants, by a would-be competitor, the Pennsylvania Sugar Refining Company. It then sets forth, at length, the means by which the alleged purpose was to be accomplished, and what are put forward as overt acts done in pursuance of the plan. In other counts, referring to the first, the defendants are alleged to have conspired to monopolize the trade in refined sugar among the States. They are similar counts as to the trade in raw sugar and molasses, and as to trade with foreign nations. The offenses aimed at, of course, are the conspiracies punished by the act of July 2, 1890, c. 647, 26 Stat. 209, commonly known as the Sherman Act.

There are other counts in the indictment, but the argument was devoted mainly to these. The defendants sever-

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ally pleaded to all of them the limitation of three years fixed by Rev. Stat., § 1044, alleging that for more than three years before the finding of the indictment on July 1, 1909, they did not engage in, or do any act in aid of, such conspiracies. The defendant Kissel added averments that all the overt acts alleged to have been done within three years before July 1, 1906, were done without his participation, consent or knowledge. He also pleaded that since October 6, 1906, the Pennsylvania Sugar Refining Company had been in the hands of a duly appointed receiver.


We deem it unnecessary to state the pleadings with more particularity, because the only question before us under the act of March 2, 1907, c. 2564, 34 Stat. 1246, is whether the plea in bar can be sustained. That this court is confined to a consideration of the grounds of decision mentioned in the statute when an indictment is quashed was decided in *United States v. Keitel*, 211 U. S. 370, 399. We think that there is a similar limit when the case comes up under the other clause of the act, from a "judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy." This being so, we are not concerned with the technical sufficiency or redundancy of the [607] indictment, or even, in the view that we presently shall express, with any consideration of the nature of the overt acts alleged. The indictment charges a conspiracy beginning in 1903, but continuing down to the date of filing. It pretty nearly was conceded that if a conspiracy of this kind can be continuous, then the pleas in bar are bad. Therefore we first will consider whether a conspiracy can have continuance in time.

The defendants argue that a conspiracy is a completed crime as soon as formed, that it is simply a case of unlawful agreement, and that therefore the *continuando* may be disregarded and a plea is proper to show that the statute of limitations has run. Subsequently acts in pursuance of the agreement may renew the conspiracy or be evidence of a renewal, but do not change the nature of the original offense. So also, it is said, the fact that an unlawful contract contemplates future acts or that the results of a successful conspiracy endure to a much later date does not affect the character of the crime.

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The argument, so far as the premises are true, does not suffice to prove that a conspiracy, although it exists as soon as the agreement is made, may not continue beyond the moment of making it. It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it. It also is true, of course, that the mere continuance of the result of a crime does not continue the crime. *United States v. Irvine*, 98 U. S. 450. But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous coöperation of the conspirators to keep it up, and there is such continuous coöperation, it is a perversion of natural thought and of natural language to call such continuous coöperation a cinematographic series of distinct conspiracies, rather than to call it a single one. Take the present case. A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates [608] that the conspirators will remain in business and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan the conspiracy continues up to the time of abandonment or success. A conspiracy in restraint of trade is different from and more than a contract in restraint of trade. A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract but is a result of it. The contract is instantaneous, the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes. That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act.

The means contemplated for the exclusion of the Pennsylvania Sugar Refining Company were the making of a large loan by the American Sugar Refining Company through Kissel to one Segal and the receiving from him of more than half the stock of the Pennsylvania Company with a power of attorney to vote upon it, Segal not knowing that the American Company was behind Kissel. The loan was to be for a year, but the American Company was to use



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the power of voting to prevent the Pennsylvania Company from going on with its business, and, as Segal was dependent largely upon the returns from that company for means of repaying the loan, he was to be prevented from repaying it and the control of the Pennsylvania Company retained until it should be ruined and finally driven from business. It is alleged that the loan was made and that a vote was passed that the Pennsylvania Company refrain from business until further order of the board of directors. Now of course it well may be that the object was so far accomplished by this vote that [609] the conspiracy was at an end; but a vote upon pledged stock that might be redeemed was not necessarily lasting, and further action might be necessary to reach the desired result. The allegation that the conspiracy continued down to the date of the indictment is not contradicted by the vote. Furthermore, as we have said, the only question here is whether the plea of the statute of limitations is good.

Taking it that the conspiracies made criminal by the act of July 2, 1890, may have continuance, we are of opinion that the pleas are bad. To be sure, it still might be argued that the general rule that time need not be proved as laid applies to continuing offenses, that therefore the allegation in the indictment, so far as it specifies the time in which the conspiracy was maintained, is immaterial, and that a plea traversing only that is, in substance, a plea in confession and avoidance and good. Whether in a charge of a continuing offense even such specific ear-marks of time as those in this indictment make it enter into the essence of the offense we shall not discuss. Time is held to be of the essence in *Massachusetts* and some other States; *Commonwealth v. Pray*, 13 Pick. 359, 364; *Commonwealth v. Briggs*, 11 Met. 578; *State v. Small*, 80 Maine, 452; *Fleming v. State*, 28 Tex. App. 234; while this has been thought to be a local peculiarity, and the contrary has been decided elsewhere. *State v. Reno*, 41 Kansas, 674, 682, 683. *State v. Arnold*, 98 Iowa, 253. Bishop, *New Criminal Procedure*, §§ 397, 402. However this may be, if the plea of the statute of limitations is good where it confesses and avoids all that the indictment avers, still, as was pointed out in an able brief by the late lamented Solicitor General, it is open to too many objections and difficulties to

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be encouraged or allowed except in clear cases. Apart from technical rules the averments of time in the indictment are expected and intended to be proved as laid. The overt acts relied upon coming down [610] to within three years of the indictment are alleged to have been done in pursuance of the conspiracy, and the pleas must be taken to deny that allegation, unless they rely upon the supposed impossibility of the acts having the character alleged. It is only by an artificial rule, if at all, that the plea can be treated as not traversing the indictment, and we are not prepared to give that supposed rule such an effect.

The discussion at the bar took a wider range than is open at this stage. It hardly is necessary to explain that we have nothing to say as to what evidence would be sufficient to prove the continuation of the conspiracy, or where the burden of pleading or proof as to abandonment would be. We deal only with a naked and highly technical question, when once the possibility of continuation is established, and as to that we cannot bring ourselves to doubt.

To sum up and repeat. The indictment charges a continuing conspiracy. Whether it does so with technical sufficiency is not before us. All that we decide is that a conspiracy may have continuance in time, and that where, as here, the indictment, consistently with the other facts, alleges that it did so continue to the date of filing, that allegation must be denied under the general issue and not by a special plea. Under the general issue all defenses, including the defense that the conspiracy was ended by success, abandonment, or otherwise more than three years before July 1, 1906, will be open and unaffected by what we now decide.

Judgment reversed.

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[183] MANNINGTON ET AL. v. HOCKING VALLEY RY. CO. ET AL.

(Circuit Court, S. D. Ohio, E. D. June 13, 1910. On Motion for Temporary Injunction, etc., August 3, 1910.)

[183 Fed. Rep., 133.]

COURTS (§ 289).—JURISDICTION OF FEDERAL COURTS.—FEDERAL QUESTION.—A suit based on an alleged violation of Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).

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whereby direct and special injuries are inflicted on and threatened to the complainants, is one arising under a law of the United States of which a federal court has jurisdiction regardless of the citizenship of the parties.\*

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 830; Dec. Dig. § 289.

Jurisdiction in cases involving federal question, see notes to *Bolley v. Mosher*, 11 C. C. A. 308; *Montana Ore Purchasing Co., v. Boston & M. C. C. & S. Min. Co.*, 35 C. C. A. 7.]

REMOVAL OF CAUSES (§ 95)—PROCEEDINGS FOR AND EFFECT OF REMOVAL—PROCEEDINGS IN STATE COURT AFTER REMOVAL—The filing of a sufficient petition and bond for removal, in a cause which is removable, ipso facto divests the state court of jurisdiction to proceed further therein except to pass on the sufficiency of the papers, and any further action it may take is coram non iudice and void. While a formal order of removal is usual, it is not necessary, nor will the failure of the state court to take any action on the petition prevent the attaching of the jurisdiction of the federal court.

[Ed. Note.—For other cases, see Removal of Causes Cent. Dig. §§ 204, 205; Dec. Dig. § 95.]

INJUNCTION (§ 157)—ORDERS—WHAT CONSTITUTE—ORAL OPINION OF COURT—"JUDGMENT."—An oral opinion of a judge sustaining a motion for a preliminary injunction is not a "judgment," either under the Ohio statutes or the rule of the federal courts nor does it become effective as an order and binding on the parties until reduced to writing and entered of record, nor, in Ohio, until bond has been given and approved.

[Ed. Note.—For other cases, see Injunctions, Cent. Dig. §§ 340, 342; Dec. Dig. § 157.

For other definitions, see Words and Phrases, vol. 4, pp. 3827-3842; vol. 8, pp. 7695, 7696.]

REMOVAL OF CAUSES (§ 114)—JURISDICTION ACQUIRED BY FEDERAL COURT—MOTIONS PENDING IN STATE COURT.—After the removal of a cause, the federal court has authority to hear and act on a motion pending in the state court at the time of removal to modify or vacate a restraining order or preliminary injunction previously granted.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 241-244; Dec. Dig. § 114.]

RAILROADS (§ 15)—RIGHT TO REDEEM PREFERRED STOCK—OHIO STATUTE.—Rev. St. Ohio, § 8309b (Gen. Code, § 8905), authorizes railroad corporations to issue preferred stock and to provide in their articles of incorporation terms and provisions of such preferred stock in addition to and not inconsistent with the provisions of section 8309, Rev. St. (Gen. Code, § 8617), which provides, inter

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alls, that "the company which issues such preferred stock shall reserve the privilege of redeeming and canceling the same at par at any time after three years from the date of its issue." Rev. St. Ohio, § 3264 (Gen. Code, § 8700), which is a part of the general [184] corporation act, provides that the board of directors of a corporation may, "with the written consent of the persons in whose names a majority of the shares of the capital stock stands on the books of the company, reduce the amount of its capital stock, \* \* \* and a certificate of such action shall be filed with the Secretary of State." A railroad company organized under such statutes issued both common and preferred stock, having equal voting power; the preferred being the greater in amount. Its articles of incorporation and each certificate of stock, whether common or preferred, contained a provision that "all the preferred stock is and will be subject to the right of the company to redeem the same at par at any time after three years from the date of its issue." Held, that such right of redemption was not only expressly given by statute, but was also a matter of contract between the company and each stockholder, common and preferred, and one which could be exercised by the board of directors as a part of the corporate business which devolved on them without reference to the provisions of Rev. St. Ohio, § 3264 (Gen. Code, § 8700), relating to the reduction of capital stock.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 31; Dec. Dig. § 15.]

**EVIDENCE (§ 73)—DIRECTORS—PRESUMPTION IN FAVOR OF LEGALITY AND GOOD FAITH OF ACTS.**—In the absence of a showing of the votes cast at a corporate election, the presumption is that the board of directors of a corporation were elected by all of the stockholders, and that the stockholders in so doing acted in their own interest.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 94; Dec. Dig. § 73.]

**CORPORATIONS (§ 506)—SUIT INVOLVING RIGHTS OF STOCKHOLDERS—PARTIES.**—Where it is claimed that one corporation cannot under the statute lawfully own the stock of another, a court cannot, in a suit to which such stockholding corporation is not a party, adjudge the constitution of the board of directors of the corporation issuing the stock illegal, on the ground that certain of its stock was held and voted at the corporate election by such stockholding corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1959; Dec. Dig. § 506.]

**CORPORATIONS (§ 389)—POWERS—HOLDING STOCK IN OTHER CORPORATIONS—BURDEN OF PROOF.**—When a corporation asserts that it is clothed with a given power, such as the power to acquire and hold stock in another corporation, the burden rests upon it to show whence such power and right are derived.

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[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1570; Dec. Dig. § 389.]

**RAILROADS (§ 13)—PUBLIC OR PRIVATE CORPORATIONS.**—A railroad company is a private corporation, but not in the strict sense of the ordinary business corporation, because it is charged with duties of a public nature which distinguish it from the purely and strictly private corporation. In many respects it is a private corporation in all that the term implies; its foundation is private, it is organized for gain, and its strictly private rights are as much beyond legislative control as are the rights of the purely private corporation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 26; Dec. Dig. § 18.]

**STATUTES (§ 214)—CONSTRUCTION—LEGISLATIVE INTENT.**—In the construction of statutes the intent of the law-makers must be found in the statutes themselves. The presumption is that language has been employed with sufficient precision to disclose the intent, and, un- [185] less an examination overthrows the presumption, nothing remains but to enforce the statute as written.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 290; Dec. Dig. § 214.]

**STATUTES (§ 217)—CONSTRUCTION—EXTRINSIC AIDS TO CONSTRUCTION.**—In construing statutes the courts should not close their eyes to what they know of the history of the country and of the law, of the condition of the law at a particular time, of the public necessities felt, and other kindred things, for the reason that regard must be had to the words in which the statute is expressed as applied to the facts existing at the time of its enactment.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 298; Dec. Dig. § 217.]

**RAILROADS (§ 121)—PURCHASE OF STOCK OF OTHER COMPANIES—OHIO STATUTE.**—The amendment of May 6, 1902, to Rev. St. Ohio, § 3256 (95 Ohio Laws, p. 390), now section 8603, Gen. Code, which provides that "private corporations may purchase or otherwise acquire and hold shares of stock in other kindred but not competing corporations, whether domestic or foreign, but this shall not authorize the formation of any trust or combination for the purpose of restricting trade or competition," applies to railroad corporations, such provisions and those of Rev. St. Ohio, § 3300 (Gen. Code, §§ 8806, 8807, 8809) which specifically authorize railroad companies to subscribe for stock in other companies under certain conditions, being cumulative.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 381-385; Dec. Dig. § 121.]

**CORPORATIONS (§ 642)—FOREIGN CORPORATIONS—DOING BUSINESS IN STATE.**—The mere ownership of stock by a foreign corporation in a domestic corporation, even if it be a controlling interest, does not constitute the doing of business in the state.

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[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520-2527; Dec. Dig. § 642.]

Foreign corporations "doing business" in state, see notes to *Wagner v. J. & G. Meskin*, 88 O. C. A. 585; *Ammons v. Brunswick-Balko-Collender Co.*, 72 O. C. A. 622.]

**CORPORATIONS (§§ 376, 440, 460)—AUTHORITY TO BORROW MONEY—PURPOSE.**—Where a corporation has power to purchase its own shares, it may buy them on credit, or may borrow money on mortgage or otherwise to pay for them.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1530, 1775-1777, 1813; Dec. Dig. §§ 376, 440, 460.]

**WORDS AND PHRASES—"REDEEM."**—The word "redeem," as used in statutory provisions authorizing a party to redeem, means "repurchase."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6022, 6023.]

**RAILROADS (§ 121)—PURCHASE OF STOCK IN OTHER CORPORATIONS—"COMPETING LINE."**—By the terms of section 8806, Gen. Code Ohio, allowing a railroad to acquire stock in another line, no road or line may be termed competing until it is constructed. Competition as between railroads necessarily relates to transportation, and, in respect to transportation, the term "competing" signifies a road complete and ready for operation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 381-385; Dec. Dig. § 121.]

For other definitions, see Words and Phrases, vol. 2, pp. 1362, 1363.]

[136] **STATUTES (§ 162)—REPEAL OF SPECIAL BY GENERAL ACT—RAILROAD COMPANIES—PURCHASE OF STOCK OF OTHER COMPANIES—OHIO STATUTE—"CLEARLY"—"CUMULATIVE."**—The provisions of the amendment to Rev. St. Ohio, § 3256, and of section 3300, now sections 8806, 8807, and 8809, Gen. Code, relating to stock purchases and holdings, are clearly cumulative and meet the requirements of section 3269, now section 8733, Gen. Code, reciting that a "special provision shall govern unless it clearly appear that the provisions are cumulative"—the word "clearly" meaning in a clear manner, without obscurity, without entanglement or confusion, without uncertainty; and "cumulative" meaning "additional," that which is superadded to another thing of the same character and not substituted for it.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 235-237; Dec. Dig. § 162.]

For other definitions, see Words and Phrases, vol. 2, pp. 1223, 1783.]

**CORPORATIONS (§ 631)—FOREIGN CORPORATIONS—EXERCISE OF CHARTER POWERS—RULE OF COMITY.**—In Ohio, as in other states and territories, in harmony with the general rule of comity, the presumption

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is indulged that a corporation of a foreign state, not forbidden by the law of its being, may exercise within the state the general powers conferred by its own charter, unless it is prohibited from so doing either in the direct legislative enactments of the state, or by its public policy as deduced from the general course of legislation, or from the settled adjudications of its highest court.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 631.]

In Equity. Suit by Howard D. Mannington, Fred H Schoedinger, and Ralph E. Westfall, against the Hocking Valley Railway Company and the Chesapeake & Ohio Railway Company. On motion by defendants to dissolve temporary restraining order and by complainants for preliminary injunction. Order modified, and injunction granted in modified form.

"This case is here on removal. The defendant, an Ohio corporation, was organized in 1899 to take over the Columbus, Hocking Valley & Toledo Railway Company, then under foreclosure, and all of its property of whatever kind. To reduce the fixed charges, the plan of reorganization provided for a reduction of the indebtedness to be cared for and for the issue of preferred stock as compensation for such reduction. It also provided that: 'The preferred stock will be entitled, out of any and all surplus net profits, to non-cumulative dividends, whenever declared by the board of directors, at the rate of, but not exceeding 4 per cent per annum, for the fiscal year beginning on the 1st day of January, 1899, and for each and every fiscal year thereafter, payable in preference and priority to any payment of any dividends on the common stock for such fiscal year; in addition thereto, in the event of the dissolution of the corporation, the holders of the preferred stock shall be entitled to receive the par value of the preferred shares out of the surplus funds of the corporation before anything shall be paid therefrom to the holders of the common stock.'

"The defendant was authorized, under section 3309b, Rev. St. Ohio, chapter on Railroad Corporations (section 8805, Gen. Code), to issue preferred as well as common stock and to provide in its articles of incorporation 'terms and conditions of such preferred stock in addition to and not inconsistent with the provisions of section 3309' (section 8817, Gen. Code). Section 3309 provides that: 'If preferred stock be issued, the company may guarantee to the holders thereof semi-annual or quarterly dividends to an amount not exceeding six per cent per annum, payable at its office, or at such other place as the directors may designate; the stock may be sold at such time and place, either within or without the state, as may be deemed advisable, and the proceeds thereof applied to the purpose for which it is issued; the unpreferred [187] stock of the company shall be entitled to divi-

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dends only out of the surplus of the profits, after setting apart a sum sufficient to pay the dividends upon the preferred stock, and the company which issues such preferred stock shall reserve the privilege of redeeming and cancelling the same at par, at any time after three years from the date of its issue; and the preferred stock herein provided for may be convertible into bonds of the company at the option of the parties.'

"The defendant inserted in its articles of incorporation and in every certificate issued, both common and preferred, the following language: 'All the preferred stock is and will be subject to the right of the company to redeem the same at par at any time after three years from the date of its issue.' 280,000 shares of the par value of \$100 per share were issued, of which 110,000 shares were common and 150,000 shares were preferred. The voting power was given to both kinds of stock. The preferred stock was also given the right to receive out of the net surplus profits a 4 per cent noncumulative dividend whenever declared by the directors, payable in preference and priority to the payment of any dividends on the common stock. In case of the dissolution of the corporation, the preferred shareholders were to receive the par value of their stock out of the surplus funds of the corporation before payment should be made to the holders of common stock. The defendant's board of directors on April 1, 1910, resolved to retire the preferred stock on April 30th, at par value, plus accrued interest at 4 per cent from December 31, 1909, and deposited \$15,200,000 with J. P. Morgan & Co. of New York City, for that purpose. At the same time a resolution was adopted, calling a meeting of the stockholders for the purpose of increasing the common stock to the extent of \$15,000,000. Formal notice of such retirement and intended new issue was duly given in New York papers. The proposed changes were also conspicuously noticed in a leading Columbus newspaper. This stock, if issued, is first to be offered to the common shareholders (the number of which is not shown) according to their holdings. A pronounced majority of the preferred stock certificates have been deposited with Morgan & Co. for retirement, and stock to the amount of more \$5,000,000 had been redeemed prior to the granting of the hereinafter mentioned restraining order prohibiting such retirement. The residue of the fund, amounting to about \$10,000,000, awaits the court's action. Section 3264, Rev. St., of the general incorporation act (section 8700, Gen. Code), provides: 'The board of directors of any such corporation may, with the written consent of the persons in whose names a majority of the shares of the capital stock thereof stands on the books of the company, reduce the amount of its capital stock and the nominal value of all shares thereof, and issue certificates therefor, but the rights of creditors shall not be affected or impaired thereby; and a certificate of such action shall be filed with the secretary of state.'

"The defendant's line extends from Toledo, Ohio, through the coal fields of South Central Ohio to the Ohio river. The road of the

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Toledo & Ohio Central Railway Company, a competing and parallel line, extending from Toledo to the same coal fields, connects at Corning with the Kanawha & Michigan Railway Company, with which it forms a continuous line extending into the coal fields of West Virginia and terminating at Gauley Bridge in that state. The Zanesville & Western Railway Company also enters the Ohio coal fields. The defendant as contemplated by the reorganization plan, acquired control through stockholdings not only of various coal companies and large areas of coal lands, but also of the Kanawha & Michigan Railway Company, and the Toledo & Ohio Central Railway Company. The last-named company in turn owned the stock of the Zanesville & Western Railway Company. The defendant thus dominated three other coal roads.

"In 1903 the Trunk Line Syndicate was formed, consisting of the Chesapeake & Ohio Railway Company, a Virginia corporation, the Baltimore & Ohio Railroad Company, the Lake Shore & Michigan Southern Railroad Company (a controlled line of the New York Central & Hudson River Railway Company), the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company (a controlled line of the Pennsylvania Company), and the Erie Railroad Company. The Chesapeake & Ohio Railway Company became the owner of 11,540 shares of the common stock of the defendant company. The other members of the syn[188]dicate owned in the aggregate 57,702 shares of such stock. The syndicate company thus owned a majority of the defendant's common stock. Through an advisory committee they interfered in the management of the defendant's affairs. They did not, however, own any part of the defendant's preferred stock, which was held and owned by about 1,200 different persons. The roads comprising the Trunk Line Syndicate reach the coal fields of South-eastern Ohio, West Virginia, and the Pittsburg district. All of the hereinbefore named roads were interested and engaged in the transportation of coal from the coal fields reached by them respectively to the Upper Lakes and the Northwest. The defendant, in a quo warranto proceeding having been ousted from its stockholdings in coal companies and the railways controlled by it (12 Ohio Cir. Ct. R. [N. S.] 49, 145), proceeded to dispose of such holdings, and subsequent to such last annual election of directors the Chesapeake Company acquired the 57,702 shares of the defendant's common stock owned by the other members of the Trunk Line Syndicate. Certain of the directors of the defendant company resigned, whereupon as authorized by the rules and regulations of the company and by section 3248, Rev. St. (section 8662, Gen. Code), the remaining directors filled the vacancies so created for the unexpired term by appointment. The appointees were persons connected with the Chesapeake Company, who, it is asserted by the plaintiffs and denied by the defendant, were mere dummies, hostile to the interests of the Hocking Company, and will subject it to the domination of the Chesapeake Company.

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The Lake Shore & Michigan Southern Railway Company in the meantime acquired all of the stock of the Toledo & Ohio Central Railway Company and of the Zanesville & Western Railway Company, and a portion of that of the Kanawha & Michigan Railway Company, which connects with the Toledo & Ohio Central Railway Company at Corning, Ohio, and also touches the defendant company's line at different points in Ohio. Another portion of the stock of the Kanawha & Michigan Railway Company was purchased by the Chesapeake Company, and a third portion is owned by parties other than the Lake Shore & Michigan Southern Railway Company and the Chesapeake Company. These two last-named companies have made, or are about to make, an arrangement whereby they will each have representation on the directory of the Kanawha & Michigan Railway Company's road and each have the use of its tracks for transporting coal from West Virginia to the Northwest; the loaded trains proceeding northward from its northern connections over the defendant's road, and the empty trains returning southward over the Toledo & Ohio Central Railway Company's road to its connection with the Kanawha & Michigan, and thence over its tracks to points in West Virginia. The Chesapeake Company, through proceeds derived from the sale of its bonds, intends to buy a majority of defendant's new common stock issue.

"The plaintiffs, who are stockholders in the defendant company, in behalf of themselves and all other stockholders, filed a petition against the defendant—the Chesapeake Company not being made a party—in the state court April 27, 1910. They charge that the defendant and its controlled roads and the Trunk Line Syndicate entered into an unlawful combination and conspiracy to stifle competition and restrain trade in the mining and shipping of coal from the coal fields of Ohio, West Virginia, and Pennsylvania to the Upper Lakes and the Northwest. Many specific acts of wrongdoing in the way of discrimination in rates against independent coal operators and against the rights of stockholders, and in violation of the state and federal laws, are alleged, which acts are claimed to work direct, actual, specific personal injury to the plaintiffs and the other stockholders. They allege that the purchase of the defendant's stock by the Chesapeake Company from the other members of the Trunk Line Syndicate and the sale by the defendant company of its stockholdings were a mere device to evade the decree of the state court; that the defendant and the roads formerly controlled by it, the Chesapeake Company, and the Lake Shore & Michigan Southern Railway Company, intend to perpetuate the course of wrongful conduct pursued while the Trunk Line Syndicate was in existence and the defendant company controlled the roads whose stock it owned; that the board of directors of the Hocking Company is not a legal board; that the proposed retirement of its preferred stock and the issuing of common stock is illegal; that such preferred stock can[not] be retired except by vote of the stockholders; that the funds of the defendant cannot be applied to the

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retirement of the preferred stock—such funds so deposited with J. P. Morgan & Co. consisting of the proceeds of the sale of its former stockholdings in other roads and coal companies and \$2,500,000 of borrowed money; that it cannot legally borrow money for the retirement of preferred stock; that the Chesapeake Company can not lawfully acquire and hold stock in the defendant company; and that the Chesapeake Company, which has transported West Virginia coal to the Upper Lakes by carrying it to Cincinnati and Ironton, Ohio, and thence shipping it over the Cincinnati, Hamilton & Dayton Railway Company and the Detroit, Toledo & Ironton Railway Company, respectively, to Toledo and the Northwest, is a competitor of the defendant in the shipment of coal. All these things were denied by the defendant, and, after the Chesapeake Company was made a party, by it also. For the purposes of this opinion a more detailed statement of the petition is unnecessary.

“On an ex parte hearing an order issued from the state court restraining the defendant, among other things, from retiring its preferred stock, from taking any action in that behalf, and from using or disbursing any of its assets or funds for that purpose; from increasing its common stock or taking any action in regard thereto in consequence of any direction, authority, or alleged action of its common stockholders, and from calling or holding any meeting of such common stockholders; from recognizing the Chesapeake Company as a stockholder and permitting it or any one acting in its behalf to vote any stock held by it directly or indirectly in the defendant company; from borrowing any money for the retirement of preferred stock; and from doing any of the threatened illegal and unlawful acts alleged in the petition. Thereafter the defendant moved to modify the restraining order so as to permit the retirement of its preferred stock to proceed and the use and disbursement of the funds held and deposited for that purpose, and also to permit the holding of meetings of its common stockholders. The motion to modify the restraining order was heard and submitted. Counsel are not agreed, and the record is not clear, as to whether a motion for a temporary injunction was submitted at the same time or not. On the morning of May 16th the court announced a denial of the motion to modify and granted a temporary injunction. Shortly thereafter a sufficient petition and bond for removal to this court were filed, and the court's attention was directed to that fact. A few minutes later the order for removal was submitted for its allowance. Thereafter, and before taking any other action, the court appointed receivers for the defendant company. Nearly three hours later, after the noon recess, the court approved an entry overruling the motion to modify the restraining order, granting an injunction, fixing the injunction bond, appointing receivers, and fixing their bond, which entry was journalized and such bonds given. The court also approved an entry declining ‘to make any order one way or the other’ as to the removal of the cause to this court, for the



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reason that it had 'no jurisdiction or power to decide the question involved by the petition for removal.' The intervenor, Stanton, has for some years past owned 500 shares of the defendant's stock. The plaintiffs own in the aggregate 150 shares of the preferred stock, of which 125 shares were purchased shortly prior to the last October corporate election, and 25 shares shortly subsequent thereto. They also own 90 shares of the common stock, which were acquired after the redemption of the preferred stock had been ordered by the defendant's board of directors. Certified copies of the proceedings in the state court have been filed in this court. The case is submitted on the pleadings, affidavits, and records and documents offered as exhibits."

*Cyrus Huling, Smith W. Bennett, and W. H. Jones, for plaintiffs.*

*Lawrence Maxwell, for Chesapeake & O. Ry. Co.*

*Wilson and West, James H. Hoyt, and Lawrence Maxwell, for defendant company.*

*Wade H. Ellis and Challen B. Ellis, for Stanton.*

SATER, District Judge (after stating the facts as above).

The petition and bond for removal to this court, which were filed and [140] brought to the state court's attention soon after it rendered its opinion refusing to modify the restraining order and granting a temporary injunction, are, and are conceded to be, sufficient in substance and form. An order for removal was presented to it for allowance; but, instead of allowing such order or determining the sufficiency of the petition and bond, the court proceeded to appoint receivers for the defendant, the Hocking Valley Railway Company. The entry overruling the motion to modify the restraining order, allowing a temporary injunction, fixing the amount of the injunction bond, appointing receivers, and fixing their bond, was not approved, filed, or journalized until nearly three hours later. The petition charges a violation of the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), whereby certain direct, actual, and special injuries are inflicted on and threatened to the plaintiffs and intervenor, independent of those caused to the general public, or to all alike, merely from the suppression of competition in trade and commerce

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among the states. This court, therefore, has jurisdiction. *Bigelow v. Calumet & Hecla Min. Co.* (C. C.) 155 Fed. 869, and 167 Fed. 721, 94 C. C. A. 13; *Mera Capsule Co. v. U. S. Capsule Co.* (C. C.) 67 Fed. 414; *A. Booth & Co. v. Davis* (C. C.) 127 Fed. 875, and 131 Fed. 31, 65 C. C. A. 269; *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031; *Robinson v. Suburban Brick Co.*, 127 Fed. 804, 62 C. C. A. 484; *Leonard v. Abner-Drury Brewing Co.*, 25 App. D. C. 161; *Chalmers Chemical Co. v. Chadeloid Chemical Co.* (C. C.) 175 Fed. 995; *Union Trust Co. v. Atchison, T. & S. F. R. Co.* (C. C.) 64 Fed. 724; *In re Debs*, 158 U. S. 564, 600, 15 Sup. Ct. 900, 39 L. Ed. 1092.

It consequently follows that on the filing of the petition and bond, the case being removable, it was, by the terms of section 3, c. 866, Act Aug. 13, 1888, 25 Stat. 435 (U. S. Comp. St. 1901, p. 510), "the duty of the state court to accept said petition and bond and proceed no further in such suit." Its authority to take any further proceedings in the case, except to examine into the legal sufficiency of the removal papers, ceased, ipso facto (Black's Dillon on Removal of Causes, § 189; *Railroad Co. v. Koontz*, 104 U. S. 14, 26 L. Ed. 643; Foster's Fed. Pr. [4th Ed.] 1586, 1587), and that of this court attached (18 Ency. Pl. & Pr. 347; *Marshall v. Holmes*, 141 U. S. 594, 12 Sup. Ct. 62, 35 L. Ed. 870; *Steamship Co. v. Tugman*, 106 U. S. 122, 1 Sup. Ct. 58, 27 L. Ed. 87; *Monroe v. Williamson* [C. C.] 81 Fed. 977; *Probst v. Cowen* [C. C.] 91 Fed. 931; Foster's Fed. Pr. [4th Ed.] 1585, 1586). A formal order of removal is usual; but such order by the state court was not necessary to confer jurisdiction on this court, nor could it by declining to make such order prevent jurisdiction from attaching here. *Kern v. Huidekoper*, 103 U. S. 490, 26 L. Ed. 354; *Hubbard v. Chicago, M. & St. P. Ry. Co.* (C. C.) 176 Fed. 994; *Railroad Co. v. Koontz*. Its authority to proceed further in the case having ended, all subsequent action had therein, including the appointment of receivers and approval of entries, was coram non judice and absolutely void. *Flint v. Coffin* (C. C. A.) 176 Fed. 872, 874; *Gordon v. Longest*, 16 Pet. 97, 10 L. Ed. 900; *Virginia v. Rives*, 100 U. S. 313, 317, 25 L. Ed. 667; *Railroad Co. v. Koontz*.

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[141] The plaintiffs assert that the state court's announcement of the granting of a temporary injunction has, nevertheless, all the force and effect of a judgment, and cite *State v. Meacham*, 6 Ohio Cir. Ct. R. 31, and Black on Judgments, § 106. Their position is that a judgment, though not entered, is still a judgment, that the omission to enter it does not destroy it, and that its vitality does not remain in abeyance until it is recorded. The defendant company appeals to the Ohio statutes and asserts that the court's announcement of its conclusions does not rise to the dignity of a judgment and is wholly ineffective, and that it is entitled to a hearing in this court on its motion to modify the restraining order filed in the state court. The General Code classifies injunctions under "provisional remedies." It does not designate a temporary injunction as a judgment. A temporary injunction is a provisional remedy (section 11,875), a temporary order (section 11,876), and when granted is allowed as a temporary remedy (section 11,879). It is not a judgment. The judgment in an injunction suit is the final order rendered in the court in which the trial of the action is had. Sections 11,879, 11,875. This is in harmony with section 11,582, which declares that "a judgment is the final determination of the rights of the parties in action," and defines an order to be "a direction of a court or judge, made or rendered in writing and not included in a judgment." An order does not become effective until it is entered on the journal. It lacks finality, and hence the qualities or the consequences of a judgment. 23 Cyc. 667; *Finnell v. Burt*, 2 Handy, 202. Section 11,882 provides that:

"Unless otherwise provided by special statute, no injunction shall operate until the party obtaining it gives a bond executed by sufficient surety, to be approved by the clerk of the court granting the injunction, in an amount to be fixed by the court or judge allowing it, to secure to the party enjoined the damages he may sustain, if it be finally decided that the injunction ought not to have been granted."

As the bond was not executed until after the court had approved the entry fixing the amount, at which time it had lost jurisdiction of the case, the bond is void. The temporary injunction authorized by the court consequently never became operative or binding on the defendant. Section

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11,885. The status of the state judge's orally expressed determination allowing the temporary injunction, as fixed by the state statute, accords with the federal rule. *Judson v. Gage*, 98 Fed. 540, 542, 39 C. C. A. 156. The views above expressed also find support in *Coe v. Erb*, 59 Ohio St. 259, 52 N. E. 640, 69 Am. St. Rep. 764.

The case, therefore, came into this court with the defendant's motion to modify the restraining order still standing. The much-discussed question of the right of this court, under the facts presented, to review the action of the state court, and the propriety of its so doing, does not arise. Section 4 of the judiciary act (act March 3, 1875, c. 137, 18 Stat. 471 [U. S. Comp. St. 1901, p. 511]), relating to the removal of causes, among other things, provides that:

"All injunctions, orders and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed."

[142] The power to modify or dissolve the order made by the state court is thus expressly conferred. The federal courts have always, after the removal of a case, exercised the right to hear and act on a motion filed in the state court to modify or vacate a restraining order or a temporary injunction. But two cases, decided, however, by distinguished and discriminating judges, will be cited in support of the rule, *Board of Com'rs v. Peirce* (C. C.) 90 Fed. 764, decided by Judge Taft, and *Perry v. Sharpe* (C. C.) 8 Fed. 15, decided by Mr. Justice Matthews sitting on the circuit in this district.

The plaintiffs deny that the power to redeem and cancel the preferred stock is conferred on the directors, and assert that the resolution for its retirement adopted by them is wholly ineffectual, and will not only constitute a purchase by the corporation of its own shares, but will also operate as a reduction of the capital stock, and that such reduction can be lawfully made only as provided by section 3264 of the general corporation act (section 8700, Gen. Code). That section requires the written consent of the persons in whose names a majority of the shares of the capital stock stands on the books of the company, and the filing of a certificate of such action with the Secretary of State. The defendant disputes the correctness of their position.

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A permanent reduction of stock or diminution of assets is not purposed. The resolution which provides for the redemption of the preferred stock also calls for a meeting of the stockholders, as required by section 3308, Rev. St. (section 8816, Gen. Code), to vote upon an issue of common stock to take the place of that redeemed and canceled. In the reorganization of the Hocking Valley & Toledo Railway Company and the acquisition of its property by the defendant, in 1899, the preferred stock was issued by the defendant company to reduce fixed charges and to lift some of the indebtedness for which it was required to provide in taking over its predecessor's property. The railway act not only authorized the issue of preferred stock, but its mandate was that the defendant company "shall reserve the privilege of redeeming and canceling the same at par at any time after three years from the date of its issue." To avoid misapprehension on the part of any one subsequently dealing with the stock, not only was the right of redemption thus exacted reserved in the articles of incorporation, but into every certificate of stock, common and preferred, there was written:

"All the preferred stock is and will be subject to the right of the company to redeem the same at par at any time after three years from the date of its issue."

The statute, as did the defendant, contemplated that the preferred stock should be, or at least might be, of a temporary character. Its holders are in fact stockholders and not creditors (*Miller v. Ratterman*, 47 Ohio. St. 141, 24 N. E. 496), and yet, as was said in the case of *Weidenfeld v. Northern Pacific Ry. Co.*, 129 Fed. 305, 63 C. C. A. 537, the facts of which in many respects resemble those of this case, the preferred stock retains to some degree the quality of the original indebtedness which it succeeded. The issue of preferred shares by a [148] incorporation, it is true, increases the capital stock; but it is also frequently the means, as every experienced lawyer knows, of raising money by pledge of the company's income. *Morawetz, Corp.* § 463. The holders of the defendant's preferred shares as against the holders of its common shares were given a preferential right in the payment of dividends, and, in case of the dissolution of the

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corporation, in the distribution of its assets. That the redemption of the preferred stock, whether common stock be substituted in its stead or not, would be advantageous to the holders of the common stock, is apparent. As against the advantages conferred on the holders of preferred stock, the right to redeem it was by unanimous consent reserved. It is unquestioned law that the defendant's charter constitutes a contract between the corporation and its stockholders. *Cook, Corp.* (4th Ed.) § 493. Stock in the railway company is held by contract between the corporation and its stockholders. *Toledo Bank v. Bond*, 1 Ohio St. 649. A certificate of stock is the muniment of the stockholder's title and evidence of his right, and in this case it also substantially expresses the contract between the corporation and his co-stockholders and himself. *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159, 180. The recitals in the articles of incorporation and the stock certificates, to borrow the language of Chancellor Kent, "are of the character and authority of permanent constitutional provisions, binding upon all the members, when adopted by all, as a solemn contract, and \* \* \* they can only be abolished by the like concurrent will by which they were adopted." *Livingston v. Lynch*, 4 Johns. Ch. (N. Y.) 573, 595. The provision relating to the redemption of preferred stock inserted in the articles of incorporation and in the stock certificates was within the terms of the statute, and each stockholder, by his purchase and acceptance of stock, assented to such provision and became bound thereby as a part of a valid and enforceable contract between himself and the corporation. *Hackett v. Northern Pac. Ry Co.*, 36 Misc. Rep. 583, 73 N. Y. Supp. 1087; *Weidenfeld v. Northern Pac. Ry. Co.*, 129 Fed. 305, 63 C. C. A. 537; *Hackett v. Northern Pac. Ry. Co.* (C. C.) 140 Fed. 717; *Thompson on Corp.* (2d Ed.) § 3600; *Cook, Corp.* (6th Ed.) pp. 742, 745, and Note; *Hamlin v. Toledo, St. L. & K. O. R. Co.*, 78 Fed. 664, 672, 24 C. C. A. 271, 36 L. R. A. 826; *Clark & Marshall on Corp.*, pp. 3476, 3480, 1311, 1312; *Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. 496.

In *Coppin v. Greenlees*, 38 Ohio St. 275, 43 Am. Rep. 425, it is said that the decided weight of authority, both in England and in the United States, is against the existence of

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the power of a corporation to buy and sell its own stock, unless such power is conferred by express grant. The foundation principle, upon which such cases rest, and which has been frequently and emphatically declared by the Supreme Court of Ohio, is that a corporation possesses no powers except such as are conferred upon it by its charter, either by express grant or necessary implication. Under the Ohio rule the law of the case is stated in the syllabus, and what was actually decided was:

"An executory agreement between a manufacturing corporation of this state and one of its stock holders, for the purchase of the stock of such cor[144]poration, by the former from the latter, cannot be enforced either by action for specific performance or for damages."

The denial of the right to purchase its own stock was based on the absence of a grant of power so to do and the constitutional provision which imposed a double statutory liability on stockholders for the satisfaction of debts due corporate creditors. But in this case the grant of power exists, and the double statutory liability has been abrogated by constitutional amendment. I have been cited to no Ohio case, and I have found none, which announces, as an inflexible rule, that a corporation may not purchase its own stock, or that the mode prescribed by section 8700, Gen. Code, for the reduction of capital stock, is exclusive. In the *Coppin case* it is said:

"If it were averred that the plaintiff had purchased this stock from the defendant, or from others, under an agreement with the company that it buy the same from him when he quit its employment, or if the contract of purchase by the defendant had been executed, very different questions would arise."

If the corporation could have purchased its stock by virtue of an agreement that it should buy the same whenever the stockholder chose to quit its employment, and such is apparently the inference to be drawn from the court's language, and such it was held in *Fremont Carriage Co. v. Thomsen*, 65 Neb. 370, 91 N. W. 376, a corporation may lawfully bind itself to do, it must follow that it could have purchased the stock if the contract had been that it should so do whenever it exercised the privilege of discharging him. The *Coppin*

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case dealt with an executory contract. This is a case of executed contract of sale, but unexecuted as to the surrender of stock for redemption and cancellation at the stipulated price. The defendant has performed its part of the contract to the extent of tendering the agreed price for redemption. The plaintiff's refusal to perform rests on a denial of the regularity of the manner in which the redemption is ordered, although it is manifest that the redemption and cancellation ordered by the directors, and heretofore unanimously agreed upon, would receive the approval of a large majority of the shareholders were the question submitted to them for action or their reaffirmance of their contract necessary. In *Morgan v. Lewis*, 46 Ohio St. 1, 17 N. E. 558, the plaintiff sold certain real estate to the corporation and was paid in corporate stock. Subsequently, differences having arisen, an exchange back was made in settlement. The corporation had no debts, and no one was injured by the transaction. It was held:

"That no inflexible rule has been recognized by this court that a corporation may not in any case, nor for any purpose, receive its own stock. \* \* \* It being the law of our state that there are exceptions to the general rule that corporations may not deal in their own stock, all persons dealing with this company must be held to have done so in the light of this state of the law."

The stock, it is true, was held not to be canceled; but it was nevertheless so far canceled that it was non-assessable for the benefit of creditors who enforced the double statutory liability when the corporation subsequently became insolvent. Other cases illustrating excep[145]tions to the general rule are *Taylor v. Miami Exporting Co.*, 6 Ohio, 176, *State v. Franklin Bank*, 10 Ohio, 92, 97, *Cincinnati, etc., R. Co. v. Duckworth*, 2 Ohio Cir. Ct. R. 518, *Sanderson v. Aetna Iron Co.*, 34 Ohio St. 442. In all of the above-cited Ohio cases the stock purchases were made by the executive officers of the corporation, and not on a vote of the stockholders. In many of the states, in the absence of charter restrictions against the redemption or repurchase of its shares, where the provision therefor is not kept secret, shares may be issued subject to the stipulation that they may be bought back at the option of the corporation. *Machen, Corp.* §§ 640, 625; *Cook, Corp.* (4th Ed.) §§ 311, 312; note to *Hall v. Hender-*



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son, 61 L. R. A. 621; *In re Castle Braid Co.* (D. C.) 145 Fed. 224; *Burnes v. Burnes*, 137 Fed. 781, 70 C. C. A. 357; *U. S. Mineral Co. v. Driscoll*, 106 Va. 663, 56 S. E. 561, 117 Am. St. Rep. 1028; 7 Am. & Eng. Ency Law (2d Ed.) 818; *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370, 91 N. W. 376; *Vent v. Duluth Coffee & Spice Co.*, 64 Minn. 307, 67 N. W. 70. And in such instances such power may be exercised by the board of directors. *Lumber Co. v. Telephone Co.*, 127 Iowa, 350, 101 N. W. 742; *Chicago, etc., R. R. v. Marseilles*, 84 Ill. 643; *First Nat. Bank v. Salem Capital Flour-Mills Co.* (C. C.) 39 Fed. 89, 96.

This case, however, rests, not on an exception to a general rule, but on a specific legislative grant of power to redeem and cancel. "To redeem," it is said in *Miller v. Ratterman*, supra, "is to purchase back; to regain as mortgaged property by paying what is due; to receive back by paying the obligation." The word "redeem," as used in statutory provisions authorizing a party to redeem, means "repurchase." *Robinson v. Cropsey* (N. Y.) 2 Edw. Ch. 138, 146; *Pace v. Bartles*, 47 N. J. Eq. (2 Dick.) 170, 20 Atl. 352. Section 3380a, Rev. St. (section 9027, Gen. Code), which authorizes consolidating companies to "fix by the agreement for consolidation the terms and conditions upon which it is to be made, which terms and conditions may include the payment or retirement of the preferred stock of either or any of the constituent companies, if they have such," uses the words "payment" and "retirement" as equivalents. Every stockholder, therefore, at the time he acquired his stock and in advance of the earliest date at which it might be redeemed, agreed that the defendant might purchase it back, might regain it by paying the stipulated price therefor, just as it might repossess itself of mortgaged property which it had pledged to secure a debt. His agreement to sell his preferred stock is a continuing obligation whose performance the corporation, through its board of directors, can at the appropriate time enforce as fully as it can carry out, through the same board, an agreement to retire its corporate bonds at their maturity. The corporate powers, business, and prop-

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erty of the defendant company are exercised, conducted, and controlled by its board of directors. Section 3248, Rev. St. (section 8660, Gen. Code); *Sims v. Street Ry. Co.*, 37 Ohio St. 565; *Goodin v. Evans*, 18 Ohio St. 167. The redemption of its preferred stock is a part of its corporate business, the transaction of which devolves on its directors. They cannot make organic or fundamental changes in the composition or business of the corporation (*Railway Co. [146] v. Allerton*, 18 Wall. 233, 21 L. Ed. 902); but the retirement of preferred stock is not such a change, when unanimously agreed upon by the stockholders and authorized by statute, and the rights of creditors are not prejudiced thereby (*Weidenfeld v. Northern Pac. Ry. Co.*; *Hackett v. Northern Pac. Ry. Co.*, 36 Misc. Rep. 583, 73 N. Y. Supp. 1087; *Clark & Marshall on Corp.* p. 3480; 2 *Purdy's Beach on Private Corp.* pp. 1284, 1285). If the directors may not redeem the stock, then, by reason of the superior voting power of the preferred shareholders, stock of a temporary character may remain outstanding during the life of the corporation.

Each shareholder in the purchase of his stock dealt with the corporation at arm's length as a distinct and artificial entity or person. In entering into its contractual relation with him, the corporation reserved to itself the option of redeeming or repurchasing his stock after a specified date. The preponderance of the voting power has always been with the preferred shareholders. They could at all times have named the board of directors and controlled the corporate policy. A large majority of them, by depositing their certificates of stock for redemption, have expressed their willingness to abide by the contract. None of the petitioners, as a party to an option contract freely made, may decide that the corporation, the other party thereto, through its duly chosen business representatives, in so long as it acts within the terms of such contract, shall not exercise the option reserved therein to buy back the property sold. *Watts v. Kellar*, 56 Fed. 1, 5 C. C. A. 394; *Johnston v. Trippe* (C. C.) 33 Fed. 530; *Hackett v. Northern Pac. Ry. Co.*, 36 Misc. Rep. 583, 73 N. Y. Supp. 1087. A statute should not be so construed as to sanction the repudiation of a legally authorized contract by one of the parties thereto, or as to require so useless

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a thing as his ratification of it, or as to permit him to deprive the other party from exercising his reserved right to enforce one of its provisions at a time which by its very terms such other party may himself designate. Section 3264 undoubtedly applies where there is no legally authorized contractual relation between the corporation and its several stockholders as to the redemption of stock, such as is here shown to exist. By limiting its application to cases of that character, inconsistency between it and the sections which authorize the issuing of preferred shares, and direct that the right of buying them back after a specified date shall be reserved, is obviated.

The controversy in this case is wholly between the corporation and four of its stockholders. No creditor is complaining, and no one can complain, because the recitals in the articles of incorporation were notice to him of the reserved right to redeem. Future creditors cannot complain, because they will be held to have given credit upon the amount of the stock then outstanding. They cannot even claim that the repurchase was irregularly made. Cook, Corp. (4th Ed.) § 289. Even prior to the abrogation of the constitutional provision imposing a double statutory liability on stockholders for the payment of corporate debts, the requirement of section 3264, Rev. St. (section 8700, Gen. Code), that a certificate of the reduction of capital stock shall be filed with the Secretary of State, accomplished little more than the maintenance of a record in his office of the authorized capital at any [147] given time. Actual and prospective creditors could not safely rely on such record as indicative of the amount of stock subject to the double liability, because such record did not disclose the amount of stock subscribed. Section 251, Rev. St., however, exacted that the defendant should file with the Commissioner of Railroads an annual report specifically stating the amount of capital stock subscribed and paid for. That section has been supplanted by section 605 of the General Code, which provides that the statement submitted shall be similar in character and detail to the annual report required to be made to the Interstate Commerce Commission. The report in use requires a statement of the number of shares authorized, outstanding, in the



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treasury, and issued within the year. Section 2780—24, Rev. St. (now sections 5522, 5523, 5524, Gen. Code), the excise or franchise tax law, requires every corporation for profit to report annually to the secretary of state, among other things, the amount of its capital stock as authorized, subscribed for, issued, outstanding, and paid up, and the change or changes, if any, in any of these respects subsequent to the filing of the preceding annual report. Aside from the fact that it is somewhat difficult to see how the defendant can report to the Secretary of State the increase of common stock without disclosing the redemption of its preferred shares, its next annual report to the Railway Commission and to the Secretary of State must show the retirement of such preferred shares and the issue of common stock in their stead. The abolishment of the double statutory liability has remitted creditors to the actual corporate assets as a basis of credit and for the payment of claims due them; but they will still have the same means of knowledge as heretofore as to such assets and authorized, subscribed for, and paid-up capital stock. The petitioners and intervenor cannot complain of want of publicity as to any of these matters, because they have knowledge of them and have assented to the reduction.

As justifying a conclusion different from that above announced, plaintiffs' counsel cite *Eidman v. Bowman*, 58 Ill. 444, 11 Am. Rep. 90; *McNulta v. Bank*, 164 Ill. 427, 45 N. E. 954, 56 Am. St. Rep. 203; *Leather Co. v. Kurtz*, 84 Mich. 89; *Railway Co. v. Allerton*, 18 Wall, 233, 21 L. Ed. 902; and perhaps other cases. Their facts readily distinguish them from the case at bar.

The restraining order was granted on the theory that, as in Ohio one railroad corporation cannot purchase and own the stock of a competing company, the defendant's board of directors is illegally constituted because about 70,000 shares of its common stock, now held by the Chesapeake & Ohio Railway Company, were illegally voted at the last annual election of directors, and that, when resignations occurred in the board, the vacancies were filled by persons interested in and friendly to that road, whereby it was given the domination and control of the defendant. In the absence of a

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showing of the vote cast, the presumption is that the directors owed their election to all of the stockholders, representing all of the stock, and that the stockholders aimed to benefit the corporation and acted as their interests prompted. *Memphis & Charleston R. Co. v. Woods*, 88 Ala. 642, 645, 7 South. 108, 7 L. R. A. 605, 16 Am. St. Rep. 81. At the last election only [148] about 27 per cent. of the defendant's stock was owned by railroad companies. They owned none of the 150,000 shares of preferred stock, nor is it claimed that they in any manner sought to control the conduct or vote of any of the 1,200 persons who held such shares. As vacancies occurred in the board, they were filled in the manner prescribed by statute and the corporate regulations. As the Chesapeake Company is not a party to this suit, the court may not now adjudge its stockholdings in the defendant unlawful, or the defendant's board of directors illegally constituted. In *Taylor & Co. v. Southern Pac. Ry. Co.*, 122 Fed. 147, Judge (now Mr. Justice) Lurton, said:

"It must be accepted as altogether fundamental that no court can adjudicate upon the rights, or interests, of one who is neither actually nor constructively before the court. The principle of due process of law unconditionally compels observance of the rule which limits the just jurisdiction of every court to a determination only of the rights of persons who are parties to the litigation. *N. O. Waterworks v. N. O.*, 164 U. S. 471, 480 [17 Sup. Ct. 161, 41 L. Ed. 518]. In *Mallow v. Hinde*, 12 Wheat. 193, 198 [6 L. Ed. 599], where the court found itself unable to proceed for the want of an indispensable party, it was said: 'We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever be their structure, as to jurisdiction. We put it on the ground that no court can adjudicate directly upon a person's right without the party being actually or constructively before the court.' This doctrine has over and over again been announced by the Supreme Court, and in no case more emphatically than in *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 237 [22 Sup. Ct. 308, 46 L. Ed. 499]."

Other authorities to the same point are *Weidenfeld v. Northern Pac. Ry. Co.*, *supra*; *Arkansas Valley Sugar B. & Irr. L. Co. v. Ft. Lyon Canal Co.*, 173 Fed. 601, 604, 97 C. C. A. 551; *Williams v. Bankhead*, 19 Wall. 563, 22 L. Ed. 184; *Board v. Walbridge*, 38 Wis. 179, 188; Kinkead's Code Pl. p. 12, § 14; *Fergus v. City of Columbus*, 6 Ohio N. P.

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82; *Osterhoudt v. Supervisors*, 98 N. Y. 239; *Bates, Pl., Pr. & Forms*, 1791; *Whittaker's Anno. Code* (6th Ed.) 102; *Stone v. Viele*, 38 Ohio St. 314, 318; *Daum v. Kehnast*, 18 Ohio Cir. Ct. R. 4; *Fertel v. Sampliner*, 18 Ohio Cir. Ct. R. 744; *Executors v. Young*, 72 Ohio St. 510, 76 N. E. 1132. The restraining order, except in so far as it prohibits the defendant from holding a stockholders' meeting to consider and vote upon the issue of additional stock and the sale and disposition of the same, is vacated. The point excepted is held for further consideration.

ON MOTION FOR TEMPORARY INJUNCTION AND FURTHER HEARING TO VACATE RESTRAINING ORDER.

The complainants have filed an amended bill, making the Chesapeake & Ohio Railway Company (hereinafter called the Chesapeake Company) a defendant. Additional affidavits and exhibits have been offered in evidence, and the complainants now ask for a temporary injunction. The Chesapeake Company and the Hocking Valley Railway Company (hereinafter called the Hocking Company) resist the application, and the latter asks for the vacation of the restraining order in so far as it yet remains in force.

The Chesapeake Company is by its charter authorized to purchase, own, and hold shares of capital stock of any corporation or corpora[149]tions organized under the laws of the state of Virginia, in which such company is incorporated, or of any other state, for the construction or operation of any railroad or railroads or other means of transportation. For some years past it has owned 11,540 shares of common stock of the Hocking Company. In March last it paid for and became the owner of 57,702 additional shares, whereby its holdings became a majority of the 110,000 shares outstanding.

Was the Chesapeake Company, under the circumstances of the case, lawfully authorized to purchase, and may it lawfully hold, stock in the Hocking Company, is the principal point in controversy, about which all others cluster. The complainants maintain the negative, and the companies the affirmative, of that question. Its answer involves a construc-

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tion of Ohio statutes. Although the question has been fully argued, the court approaches it with reluctance, because there has been no opinion touching it rendered by the state's highest court.

When a corporation asserts that it is clothed with a given power and the right to exercise it, the burden is on it to show whence such power and right are derived. *State v. Vanderbilt*, 37 Ohio St. 591. The burden, therefore, of showing the existence of the power and right of the Chesapeake Company to acquire and hold stock in the Hocking Company is on such companies. If, under given circumstances, an Ohio railroad corporation may acquire and hold stock in another, then it is conceded that a foreign corporation of the same character may, under the same circumstances, do likewise. When, if at all, may one railroad corporation, chartered in Ohio, purchase and hold stock in another like Ohio corporation? A review of legislation and of the state of decision in Ohio as regards the right of one corporation to acquire stockholdings in another will be helpful.

The act of March 29, 1867 (64 Ohio Laws, p. 85; sections 10172, 10173, Gen. Code), provides that should an incorporated elevator company erect or own an elevator building and use it for the purpose of receiving or delivering grain from or to any railroad company, as freight carried or to be carried over its road, or any part thereof, the railroad company may subscribe for or purchase not more than one-third of its entire capital stock.

On April 3, 1868 (65 Ohio Laws, p. 55; sections 9313, 9315, Gen. Code), it was enacted that any railroad company, or any other private corporation, organized under the laws of the state, may subscribe for or purchase the stock of a bridge company to an amount not exceeding one-third of the whole thereof, if such bridge company by the laying of tracks has prepared the bridge for railroad uses.

Each of the two above-mentioned acts fixes the limit of stockholding of the purchasing company at less than a controlling interest.

The act of April 3, 1868 (65 Ohio Laws, p. 63; sections 9160, 9163, Gen. Code), provides that railroad companies

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may own stock in union depot companies and in a union railroad connecting the companies using the depot.

Under the act of April 13, 1874 (71 Ohio Laws, p. 69; sections 10137, 10138, Gen. Code), certain mining and manufacturing corporations may purchase or subscribe for such an amount of stock of any railroad or other transportation company as its directors may deem [150] necessary in order to procure proper facilities for transportation for the factories, mines, or other works of the companies, if the holders of two-thirds of the capital stock consent to such subscription or purchase. Under the provisions of this somewhat comprehensive act, the directors, having first obtained the requisite consent of the purchasing company's stockholders, may, in the exercise of a sound discretion, determine what amount of stock it is necessary to subscribe for or purchase; whether that amount be a controlling or a less interest.

The act of April 12, 1877 (74 Ohio Laws, p. 84; sections 10170, 10171, Gen. Code), which provides that any company incorporated and organized under the laws of the state may, by the vote of a majority in interest of its stockholders, subscribe for or become the owner of stock in an incorporated common carrier company, imposes no limitation on the amount of stock that any corporation may purchase in a company of the character named, and no restriction as to the kind of corporation that may make such purchase.

Section 3300, Rev. St. (sections 8806, 8807, 8809, Gen. Code), originally enacted in 1852 (50 Ohio Laws, p. 274), but frequently amended, provides that any railroad company "may aid another in the construction of its road by means of a subscription to the capital stock of such company, or otherwise, for the purpose of forming a connection of the roads of the companies, when the road of the company so aided does not, and will not when constructed form a competing line." By another provision of the same act (section 8809, Gen. Code), such aid shall not be furnished unless the holders of at least two-thirds of the capital stock of each company first assent thereto.

A railroad company may, therefore, under the conditions named, subscribe for and acquire stock in another under the power conferred by section 8806, on the following conditions



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only: (1) To aid such other company in the construction of its road; (2) for the purpose of forming a connection of the roads of the two companies; (3) the road whose stock is purchased must not form, when constructed, a competing line as against that of the purchasing company. By the terms of this section, no road or line may be termed "competing" until it is constructed. Competition as between railroads necessarily relates to transportation, and, in respect to transportation, the term "competing" signifies a road complete and ready for operation. 8 Cyc. 405; *Penn. Co. v. Commonwealth (Pa.)*, 7 Atl. 368. The section does not confer the power on a railroad company to purchase stock in another, if the road or line of the other is completed. Its purpose is to foster competition, to encourage the development of the state and its industries, and to accommodate and supply the wants of the public by permitting one road to aid in the construction of another extending into communities destitute of or having limited railroad facilities. It contemplates that shippers and the traveling public along the lines of the purchasing road and the road which is about to be constructed or is in process of construction, or who, wherever dwelling, may have occasion to use such roads, shall be afforded transportation facilities back and forth without the purchasing company being subjected possibly to the entire burden of constructing a new line of its own into the territory which will be accommodated by the aided road.

[151] The only other corporations, in so far as I have been able to discover, which were, prior to 1902, expressly authorized by statute to invest in the stock of other companies, are safe deposit and trust companies (act May 4, 1894; 91 Ohio Laws, p. 201; sections 9840, 9841, Gen. Code), and incorporated religious, scientific, and beneficial associations not having a capital stock, but desirous of securing a lodge room, chapel, or regular place of meeting (act April 18, 1883; 80 Ohio Laws, p. 177; section 10196, Gen. Code).

Of the first six acts above mentioned, three authorize railroad corporations alone to acquire stock in another corporation, two confer the power on railroad and other private corporations alike, and one vests the power in given corporations to purchase and subscribe for stock of a railroad company.

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All of such acts contemplate increased transportation facilities. This, too, is the object of the provisions of section 8807, Gen. Code, which authorize one railroad company to acquire the control of another by leasing or purchasing any part of such railroad constructed or in the course of construction, if the two roads are continuous or connected and not competing, and of the act of March 30, 1877 (74 Ohio Laws, p. 71; section 9025, Gen. Code, and succeeding sections), which permit a consolidation of railroad companies into a single company, if their lines or any portion of them have been or are so constructed as to admit the passage of burthen or passenger cars over any two or more of such roads continuously without any break or interruption, and which also authorize consolidated roads in turn to consolidate with each other. As regards stockholding by one corporation in another, railroad companies have been favored corporations.

Such was the condition of legislation on May 6, 1902, when section 3256, Rev. St., was amended (95 Ohio Laws, p. 390; section 8683, Gen. Code) by adding thereto the following:

"A private corporation may purchase, or otherwise acquire, and hold, shares of stock in other kindred but not competing corporations, whether domestic or foreign, but this shall not authorize the formation of any trust or combination for the purpose of restricting trade or competition."

Original section 3256 specifically conferred the power on private corporations to borrow money, fixed the limitation on the amount to be borrowed and the rate of interest to be paid, and authorized the execution of a mortgage to secure the payment of both principal and interest. It did not control the conduct of railroad corporations in the borrowing of money, because their power to borrow was found in the succeeding chapter. The amendatory provision relates wholly to the purchase by one private corporation of the stock of another. The codifying commission, recognizing the want of connection between the powers conferred by the first and last portions of the section, placed the portion which constituted the original section under the subdivision of chapter 1, div. 1, tit. 2, relating to private corporations, entitled "Borrow-

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ing Money," and designated it in the General Code as section 8705. It located the portion added by the amendment in the subdivision of chapter 1, entitled "Capital Stock," and gave it the sectional number 8603 in the General Code. The Legislature, by its adoption of the General Code in February, 1910, approved the ac[152]tion of the commission. The mere fact that the power of one private corporation to buy stock in another was tacked to the section of the general corporation act, which authorized private corporations other than railway companies to borrow money, did not, in and of itself, limit the new power to such other corporations.

By the express provisions of the amendment, one private corporation may buy stock in another under the following conditions only: (1) The corporations must be kindred; (2) they must not be competing; (3) the result of the purchase must not be the formation of a trust or combination to restrict trade or competition. At the time of the passage of the amendatory act of 1902, there was an increased demand for larger units of organization in the transportation, industrial, and business world. It was an era of consolidation and combination of business enterprises, of a pronounced policy of expansion. Reduction in the cost of production or the transaction of business was thought to lie in the centralization of capital and the conduct of business on a large scale. Enlarged enterprises were established by the purchase of others, or by their consolidation into a single company, or, when permitted by law, by the purchase by some one of the stock of another. In fact, one of the favorite methods, and about the only method, of obtaining control of a corporation, is to purchase the greater part of its stock. *U. S. v. Northern Securities Co.* (C. C.) 120 Fed. 721, 725. The then existing and prior tendency as regards railway companies is forcibly set forth in *Cook on Corp.* (6th Ed.) §§ 892, 314. While it has been the declared policy of the state to prohibit railroads from purchasing or controlling competitive or rival lines, it has also been its declared policy to encourage the formation of trunk lines and their buying, building, and operating branch or feeding lines. The Supreme Court of Georgia, in speaking of consolidations and the acquisition of

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such branch or feeding lines (*State v. Central Ga. Ry. Co.*, 109 Ga. 716, 35 S. E. 37, 48 L. R. A. 351), said:

"The general effect of these consolidations and connections has really been to increase competition, has added greatly to the public convenience, and furnished greater and more commodious facilities for traveling; has operated to reduce the cost of transportation; has brought remote parts of the country into close proximity, as it were to each other; has developed resources that would otherwise have remained dormant, by opening up the markets of the world to the products of the land; and has generally contributed to work to the welfare and prosperity of the people."

The Legislature of Ohio in 1902, while it enacted new and amended existing laws taxing private corporations and erected barriers against the formation of unlawful combinations, inaugurated a new policy enlarging greatly their powers and relieving them from some of the more onerous provisions found in the statutes and the Constitution. It so amended section 3258 as to limit the bringing of actions upon the liability of stockholders to 18 months after any debt or obligation shall become enforceable against them. It caused an amendment to the Constitution to be submitted for adoption by the electors, abolishing the double statutory liability of stockholders. The proposed amendment became a part of the Constitution. It extended the privilege of issuing preferred stock with a right of redemption to such [153] corporations as had not previously had it, and so amended section 3256 as to confer, within the limitations imposed, a power not previously conferred by statute on private corporations, of purchasing each other's stock. All of this legislation was in line with that of various other states.

At the time section 3256 was amended, section 2269, found in the chapter on General Corporation Law, and preceding the chapter on Railroads, recited that:

"The provisions of this chapter do not apply when special provision is made in the subsequent chapters of this title, but the special provision shall govern unless it clearly appear that the provisions are cumulative."

The complainants claim that this section, which is still in force, forbids the application of the provisions of the amendment to section 3256 to railroad corporations. The contention

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cannot successfully rest on the ground that a railroad corporation is not a private corporation, because it is recognized as such both by the statute and the Supreme Court. See title 9 of the General Code and its sub-divisions, and section 9315. In *Toledo Bank v. Bond*, 1 Ohio St. 623, 643, it was said:

"Private institutions are those which are created or established by private individuals for their own private purposes. Public institutions are those which are created and exist by law or public authority. Some public benefits or rights may result from the institutions of private individuals or associations. So also some private or individual rights may arise from public institutions. The only sensible distinction between public and private institutions is to be found in the authority by which, and the purpose for which, they are created and exist. Because, therefore, a corporation may fall under the denomination of private corporations, in the artificial distinction between public and private corporations, it is none the less a public or political institution. The distinction between public and private corporations is somewhat arbitrary, and by no means determines whether the corporation is a public or private institution. If the stock in a banking, railroad, or insurance corporation be exclusively owned by the government, the institution is denominated a 'public corporation'; but if a private individual be allowed to own a single share of the stock, in common with the government, it is said that it becomes a 'private corporation.'"

Railroad companies are private corporations, but not in the strict sense of the ordinary business corporation, because they are charged with duties of a public nature which distinguish them from the purely and strictly private corporation; but in many respects they are private corporations in all that the term implies. They cannot be treated as public corporations, such as cities, counties, townships, and other like governmental sub-divisions. Their foundation is private. They are organized for gain, and their strictly private rights are as much beyond legislative control as are the rights of the purely private corporation. 7 Am. & Eng. Ency. Law, 637, 638; Elliott on Railroads, § 2; Cook on Corp. § 891; Morawetz on Private Corp. § 3; *Hale v. County Com'rs*, 137 Mass. 111, 114; *Dartmouth College v. Woodward*, 4 Wheat. 518, 636, 668, 669, 4 L. Ed. 629; *Rundle v. D. & R. Canal*, 21 Fed. Cas. 11.

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The contention is that the provisions of the amendment to section 3256 and of section 3300, now sections 8806, 8807, and 8809, Gen. Code, relating to stock purchases and holdings, are not clearly cumulative, and that therefore the amendatory act, not meeting the require[154]ments of section 3269, now section 8733, Gen. Code, conferred no additional power on railroad companies, and the special provisions in the chapter on Railroads govern. The word "clearly," according to Webster's definition of it, means, "in a clear manner; without obscurity; without entanglement or confusion; without uncertainty." "Cumulative," as defined by the legal lexicographers, means "additional; that which is superadded to another thing of the same character and not substituted for it." Abbott's, Black's, and Anderson's Law Dictionaries. The amendment to section 3256 is applicable to railroad corporations, if it appears in a clear manner and without uncertainty that the power given by such amendment is additional and superadded to, is not substituted for, and was of the same nature as that conferred by section 3300.

Section 3256, like section 3300, authorized stockholding in one corporation by another, when the effect thereof was to increase, or at least was not to diminish, competition. Each granted a power of the same kind—the power to purchase stock. Each prohibited a corporation from holding stock in another, if the purpose or effect of such holding was to restrict trade or competition. The stockholding in each case must be in a kindred corporation. Under each the purchasing corporation may hold and vote a majority of the stock of another, select the directory of such other, and, consequently, through such directory, manage such other corporation's business affairs. Each recognizes that all this may be done without in any wise restricting trade or competition, or constituting a trust or unlawful combination. There are, however, marked differences as between the two sections. Under the first, one corporation may, within the limitations imposed, purchase the stock of another in an operating company. It may purchase for the purposes of investment, or lawfully to acquire a controlling interest. The power is general and does not require the assent of stockholders for its exercise. Under

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it stock may be bought in the open market as well as by subscription, and without reference to aiding the corporation whose stock is purchased. Section 3300 was designed to meet the specific condition therein named. Under it one railroad company may, only with the consent of two-thirds of its stockholders, acquire stock in a connecting uncompleted road only, by subscription only, and not in the open market, for the purpose of aiding the latter. If a controlling interest be acquired, such control is incidental to the main purpose of furnishing aid. The subject-matter and purposes of the amendment to section 3256 were original and novel, and the power conferred by it is a different and broader power than that given by section 3300. The amendment conferred a new power and did not repeal or negative, expressly or impliedly, any provision found in any section of any subsequent chapter on corporations. It contains no proviso or exception, is not a substitute for, the equivalent of, or in conflict with, any prior legislative enactment. Its language is unambiguous. Given its ordinary and familiar signification, it embraces all private corporations. It contains no suggestion of discrimination against any class or classes of corporations, and no hint that the friendly policy theretofore manifested toward railroad corporations to secure increased transportation facilities was reversed, or [155] that in such facilities the acme had been attained. It is said that the previously expressed policy of the state had been to disable railroad corporations from holding stock in any but connecting aided roads, but, if that be so, it is also true that, with but few exceptions, all Ohio corporations, in so far as express legislative enactment is concerned, were disabled from holding and owning the stock of others. The history of the country and of the law, and the public and business necessities then felt, point with no uncertainty to the conclusion that it was the purpose on the part of the lawmakers in the use of the language employed, and that the precise language of the act means, that all private corporations should enjoy the new power conferred. That the act did not repeal any prior statutes upon the same subject-matter, embraces cases not covered by former legislation, and is not inconsistent with any law there-

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tofore enacted, makes it a cumulative act within the definition given by Endlich on Statutory Interpretations, § 218.

In the construction of statutes the intent of the law-makers must be found in the statutes themselves. The first resort in all cases is to the natural, ordinary, familiar signification of the words employed. The presumption is that language has been employed with sufficient precision to disclose the intent, and, unless an examination overthrows the presumption, nothing remains but to enforce the statute as written. If a law is plain and unambiguous, there is no room for construction, and it must be held that the law-making body meant what it plainly expressed, whether the expression be in general or limited terms. All of the provisions of the statute touching upon the subject-matter under consideration are to be examined, and in the comparison of sections it is not to be supposed that any words have been needlessly employed. Effect should be given, if possible, to the entire statute and to every section and clause, and one part should not be allowed to defeat another, if by any reasonable construction the two can stand together. Moreover, in construing statutes the courts should not close their eyes to what they know of the history of the country and of the law, of the condition of the law at a particular time, of the public necessities felt, and other kindred things, for the reason that regard must be had to the words in which the statute is expressed as applied to the facts existing at the time of its enactment. *Cooley's Const. Lim.* (6th Ed.) 69-74; 24 *Am. & Eng. Ency. Law*, 597, 605, 611, 616, 618; *State v. Vanderbilt*, 37 Ohio St. 643; *In re Hathaway's Will*, 4 Ohio St. 385; *State v. Schlatterbeck*, 39 Ohio St. 268, 271.

Having regard to the canons of construction, the powers conferred by sections 3256 (as amended in 1902) and 3300, are consistent, may be exercised by the same corporation, and are clearly cumulative. The Chesapeake Company was authorized to acquire and may hold the stock of the Hocking Company, providing the latter is non-competing and the result and purpose are not the formation of a trust or combination to restrict trade or competition.



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Section 3256 was not construed in *State v. Railway Co.*, 12 Ohio Cir. Ct. R. (N. S.) 49, 59, nor was a construction of it necessary in that case. The court assumed that it applied to railroad corporations.

The complainants further contend that the Chesapeake Company [156] cannot lawfully acquire and hold stock in an Ohio corporation, because section 148d, Rev. St. (section 178, Gen. Code), does not permit the issuance of a certificate by the Secretary of State to a foreign corporation to do business in this state, unless the business of such corporation to be carried on is such as can be lawfully carried on by a corporation incorporated under the laws of this state for such or a similar business, and because the purchase and holding of stock by one corporation in another, it is claimed, is in violation of the public policy of the state. The mere ownership of stock by a foreign corporation in a domestic corporation, even if it be a controlling interest, does not constitute the transaction of business. *Peterson v. Chicago, R. I. & P. Ry. Co.*, 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 841. It has been held that, without legal sanction, one corporation cannot subscribe for stock in another. *Railway Co. v. Iron Co.*, 46 Ohio St. 44, 18 N. E. 486, decided in 1888. In *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350, 354, 355, 38 Am. Rep. 594, decided in 1881, it was said that one corporation cannot become the owner of any portion of the capital stock of another corporation unless authority to become such is clearly conferred by statute. That point, however, was not before the court for decision, and the case has never been cited by the Supreme Court. Only Ohio corporations were involved in those cases. In the *Franklin Bank case*, the right to deal in shares of stock in other corporations was not found in the powers enumerated in the act under whose provisions the bank was organized; but, on the contrary, the power, in language of undoubted import, was denied and its exercise expressly prohibited.

The announcements made in the above cases are subject to the exception that to compromise a doubtful debt, or, if necessary, to save itself from loss, a corporation may become the owner of the stock of another, with a view to its subse-

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quent sale and conversion into money. *First Nat. Bank v. Nat. Exchange Bank*, 92 U. S. 122, 128, 23 L. Ed. 679; *Armstrong v. Brewing Co.*, 26 Wkly. Law Bul. 39, 40; *Coppin v. Greenlees*, 38 Ohio St. 275, 43 Am. Rep. 425; *Lamprecht v. Kehrwicher*, 40 Ohio St. 646. And from language employed in *Coppin v. Greenlees*, 38 Ohio St. 275, 43 Am. Rep. 425, and *Morgan v. Lewis*, 46 Ohio St. 1, 17 N. E. 558, it seems that still other exceptions are recognized. No case has been found in which there has been a ruling that a foreign corporation may not own stock in one incorporated within the state. The complainants contend, however, that this is immaterial. *Railway Co. v. Iron Co.*, and the *Franklin Bank case* were invoked in *Hafer v. Railroad Co.*, 14 Wkly. Law Bul. 68, 70; but in that case the foreign corporation did not own the stock of the Ohio company, although it dictated how the stock should be voted. In *Smith v. Railroad Co.*, 8 Ohio Cir. Ct. R. 583, 591, it appears that the Baltimore & Ohio R. R. Co. owned stock in the insolvent defendant company and defended against the double statutory liability on the ground that it could not legally hold the stock and that what it did or attempted to do was ultra vires and void. As to this contention the court said:

"In *Railroad Co. v. Iron Co.*, 46 Ohio St. 44 [18 N. E. 486], it is held by the Supreme Court that: 'An incorporated company cannot, unless authorized by [157] statute, subscribe to the capital stock of another; a subscription so made is ultra vires and void.' Reading this proposition of the syllabus in connection with the quotation from Morawetz, p. 49, cited in support of it, and we think it is clear that the Supreme Court only intended to hold that a corporation cannot be an original subscriber or one of the incorporators of another corporation. If the Baltimore & Ohio Company cannot hold this 'Drexel, Morgan & Co.' stock, neither could it hold any of the common or preferred stock, which it is admitted it did own. Certainly a railroad company, without express authority in its charter, may invest its idle money in the dividend-paying stock of another corporation, and if it may do that, and enjoy the benefit of the dividends while paid, may it not be liable to assessment, the same as an individual, if from any cause the corporation becomes insolvent? We think the Baltimore & Ohio Company are liable to assessment on this stock as owners.

On review of the case in the Supreme Court the Baltimore & Ohio Company claimed that it was incapacitated to hold stock in the insolvent corporation, and was therefore not

## Opinion of the Court.

subject to assessment for the payment of its debts. On the other side it was asserted that that claim had been decided adversely to the Baltimore & Ohio Company when the case was previously before the circuit and Supreme Courts. 48 Ohio St. 219, 31 N. E. 743. The court held that the question was involved in the earlier hearing and had there been determined against the company. The language of the circuit court, however, regarding the investment of idle funds, went further, I think, than the circumstances of the case required.

Foreign corporations can exercise none of their franchises or powers within this state except by comity or legislative consent (*Western Union Telegraph Co. v. Mayer*, 28 Ohio St. 521; *State v. Life Ins. Co.*, 47 Ohio St. 179, 24 N. E. 392, 8 L. R. A. 129), and may be ousted by proceedings in quo warranto, if in doing their business here they exercise franchises in contravention of local law (*State v. Life Ins. Co.*, supra; *State v. Ins. Co.*, 49 Ohio St. 440, 31 N. E. 658, 16 L. R. A. 611, 34 Am. St. Rep. 573). If the rule announced in the Smith case and the construction hereinbefore placed on section 3256 are both unsound, the Chesapeake Company's right to purchase stock in the Hocking Company, if it exists, rests on the rule of comity. In *Cowell v. Springs Co.*, 100 U. S. 55, 59, 25 L. Ed. 547, it was argued that, if a domestic corporation could not be created with given powers for reasons of public policy, a foreign corporation could not for like reasons be permitted to exercise such powers in the state or territory. Mr. Justice Field, holding against that contention, said:

"The answer to this position is found in the general comity which, in the absence of positive direction to the contrary, obtains through the states and territories of the United States, by which corporations created in one state or territory are permitted to carry on any lawful business in another state or territory, and to acquire, hold, and transfer property there equally as individuals. If the policy of the state or territory does not permit the business of the foreign corporation in its limits or allow a corporation to acquire or hold real property, it must be expressed in some affirmative way. It cannot be inferred from the fact that its Legislature has made no provision for the formation of similar corporations or allows corporations to be formed only by general law. Telegraph companies did business in several states before their Legislatures had created or authorized the creation

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of similar corporations; and numerous corporations existing by special charter in one state are now engaged, without question, in business in states where the creation of corporations by special enactment is forbidden."

[158] Mr. Justice Harlan held, in *Christian Union v. Yount*, 101 U. S. 352, 356, 25 L. Ed. 888, that:

"In harmony with the general law of comity obtaining among the states composing the Union, the presumption should be indulged that a corporation of one state, not forbidden by the law of its being, may exercise within any other state the general powers conferred by its own charter, unless it is prohibited from so doing, either in the direct enactments of the latter state, or by its public policy to be deduced from the general course of legislation, or from the settled adjudications of its highest court. There was here no such direct legislation during or prior to the year 1870, nor can the existence of such a public policy be inferred from the general course of legislation or judicial decisions in Illinois up to and including that year, in relation to religious, benevolent, charitable, or missionary societies created in other states."

The rule in Ohio is in accord with that announced in the above cases. *State v. Aetna Life Ins. Co.*, 69 Ohio St. 327, 69 N. E. 608; *Ewing v. Bank*, 43 Ohio St. 31, 37, 1 N. E. 138.

On April 19, 1894 (91 Ohio Laws, p. 154; section 250—1, Rev. St.), it was enacted that every railroad company shall make out, under oath, and file with the Commissioner of Railroads and Telegraphs, on or before September 1 of each year, a true list of the names of each and every stockholder, giving the number of shares owned by him. A blank form of the reports to the Railway Commission now and in 1909 in use, affidavits showing the various railroad companies' ownership of stock in other companies in the years 1900, 1905, and 1910, a printed copy of the Railway Commission's report for 1909, and also certain portions of the Manual of Statistics for 1910, are offered in evidence. The blank form of report requires a disclosure of what the stockholding of each company is in another, what companies are controlled through stock ownership solely or jointly by the reporting company, and what lines have been practically absorbed or joined for operating purposes. As far back as 1900, the

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official published reports of the Commissioner of Railroads and Telegraphs show that railroad corporations, foreign and domestic, had holdings in Ohio companies so extensive, and approximately so nearly the aggregate issue of all of the stock of the controlled roads, and so shifting in amounts or from one owner to another, as to suggest that such holdings could not have resulted from the mere aiding of roads in process of construction. What the reports show prior to that date is not in evidence. The right to acquire and continue such holdings, in so far as the record discloses, has not been challenged except as to the domestic companies whose roads extend into the Hocking Valley coal fields. It is also shown that the Attorney General and certain prosecuting attorneys have, by the planting of suits, attacked such substantially or actually competing domestic coal roads and disputed the right of any of them to purchase stock in another, except as authorized by section 3300. It is also true that able lawyers have resisted such suits, and asserted, and still assert, the right of one of such companies to control another through stock purchases. Nor is it to be presumed that any of the railroad corporations have purchased the stock of others, except on legal advice.

[159] Under the above-mentioned practice, in which it must be presumed the companies believed they had a right to indulge, vast sums (in one case alone more than \$92,000,000) have been expended by foreign railroad corporations in acquiring the stock of others chartered and operating in Ohio. The questions raised as to the rule of comity and the effect of such practices need not now be finally determined. My excuse for considering them is the earnestness with which they were presented by counsel. The situation is such that this court can well afford to wait, if it be practicable to do so, the action of the state's highest court, before declaring the Chesapeake Company's stockholdings not warranted by the rule of comity, and may well refuse to award an injunction on that ground until a full and final hearing.

I think it must follow, from the evidence submitted, that the use by the Chesapeake Company of the Hocking Com-

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pany's line as an outlet to the Great Lakes will result in some interference with interstate commerce; but whether such interference will be insignificant, or merely incidental, and is not a dominant purpose of the company (*Cincinnati Packet Co. v. Bay*, 200 U. S. 179, 26 Sup. Ct. 208, 50 L. Ed. 428), or whether the necessary effect of the Chesapeake Company's control of the Hocking Company will be to stifle or directly and substantially restrict free competition, or whether such effect will be but incidentally and indirectly to restrict competition, while its chief result will be to foster the trade and increase the business of all the roads concerned (*Union Pacific Coal Co. v. U. S.*, 173 Fed. 737, 740, 97 C. C. A. 578), are questions which ought not to be, and, I think, cannot satisfactorily be, determined on the evidence submitted, and should await a final hearing, at which all the facts may be developed and the witnesses subjected to the test of cross-examination. The evidence before me on this point and as to the arrangements made or to be made with the Lake Shore & Michigan Southern Railway Company, in my judgment, justifies further investigation and a full hearing.

If an additional issue of the Hocking Company's common stock be had, the Chesapeake Company will have the privilege of acquiring its proportionate share of it. Before its holdings are increased, it should be finally determined whether, under the facts of this case, it may lawfully acquire and hold any of the Hocking Company's stock.

Additional affidavits concerning the board of directors of the Hocking Company have been offered. At the last annual election of directors there were 213,631 votes cast out of a total of 260,000. No candidate received less than 213,619 votes. There were manifestly no contests. No protest or objection was made as to the conduct or validity of the election. As the shares held by the Trunk Line Syndicate numbered approximately only 70,000, it was impossible for their holders unaided to select directors. Had the 70,000 votes been rejected, the directors would still have received a majority not only of all the votes cast, but of all of the votes. had every share of stock issued been voted. If the complain-

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ing parties voted at that election—on this the record is silent—they cast their votes for the board which was declared elected. As vacancies occurred in the board, they were [160] filled in the manner prescribed by law and the regulations of the company. It will not, therefore, be enjoined from discharging the duties lawfully devolving on it.

The Hocking Company is paying interest at the rate of 5 per cent. on \$2,500,000, borrowed for the purpose of retiring its preferred stock. Having express statutory authority to redeem or purchase back its preferred stock, it had the right to borrow money for that purpose, for, where a corporation has power to purchase its own shares, it may buy them on credit or may borrow money on mortgage, or otherwise, to pay for them. *Machen on Corp.* § 630; *First Nat. Bank v. Salem Capital Flour Mills Co.*, 39 Fed. 89, 95, 96; *Berger v. U. S. Steel Corp.*, 63 N. J. Eq. 809, 53 Atl. 68. Other items of expenditure to a considerable amount are shown, for which provision must be made. The Chesapeake Company is also paying interest on a large sum expended in stock purchases and is entitled to protection in a reasonable amount for such inconvenience and loss as it may sustain. The fact is not overlooked that, if common stock should issue, it would receive dividends, if they were earned. The bond should not be prohibitive to the prosecution of the suit, and yet should be adequate to reimburse the defendant companies should they prevail on the final hearing. I have concluded that, if a sufficient bond in the sum of \$75,000, properly conditioned, be given within 10 days from the filing hereof, an injunction may go, until further order, enjoining the Hocking Company from issuing additional common stock and the Chesapeake Company from voting its stockholdings in such company for any purpose. On the failure to give such bond within the time named, the existing restraining order will stand dissolved.

The motion for a temporary injunction is granted to the extent above indicated. The motion to vacate the restraining order is overruled.

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[427] UNITED STATES *v.* READING CO. ET AL.\*

(Circuit Court, E. D. Pennsylvania. December 8, 1910.)

[183 Fed. Rep., 427.]

(Per Gray, Circuit Judge.)

**EVIDENCE (§§ 577½, 579, 580)—COMPETENCY—TESTIMONY GIVEN IN PRIOR PROCEEDING BEFORE ADMINISTRATIVE BODY.**—A copy of testimony shown by a report of the Interstate Commerce Commission to have been given by a witness in an investigation before that body, not otherwise authenticated, is not competent evidence in a subsequent suit in a federal court between different parties and in which different issues are involved.<sup>b</sup>

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2410, 2412, 2413; Dec. Dig. §§ 577½, 579, 580.]

**MONOPOLIES (§17)—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE—CONTRACTS BETWEEN COAL PRODUCERS.**—For many years small producers of coal in the anthracite regions of Pennsylvania had sold their product to contiguous large operators, who took it at the breakers and shipped and marketed the same through their own agencies, paying to the sellers therefor a certain percentage of tide-water prices, differing under different contracts. During a general strike of all anthracite miners, at a conference between the producers, in order to induce the selling operators to assent to a settlement by which all miners were to receive increased pay, the purchasing companies agreed to contract with the selling producers under an agreed form of contract by which the purchaser bought the entire product of the seller's mines, to be mined and delivered as the buyer directed, which it agreed should be the seller's just proportion of all the anthracite coal which the requirements of the market might from time to time demand. The purchasers were also to pay an increased percentage based on the general average price at tide-water during the month, to be determined by an expert accountant. The making of such a contract was optional with each seller; but several were made, and the accountant made reports which were furnished to all parties interested, and also published in trade journals. *Held*, that such agreement did not constitute nor evidence a combination or conspiracy on the part of the purchasing companies to restrain or monopolize the sale or control the price of coal in interstate commerce in violation of Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), but was the legitimate outgrowth of peculiar business conditions, and was to the

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\* Argued and submitted, and awaiting decision in the Supreme Court of the United States.

<sup>b</sup> Syllabus copyrighted, 1911, by West Publishing Company.



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advantage of the smaller producers by utilizing for the handling of their product the facilities and agencies of the larger companies, Buffington, Circuit Judge, dissenting.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. §§ 13; Dec. Dig. § 17.]

**MONOPOLIES (§12)—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE—COMBINATIONS PROHIBITED.**—To constitute a violation of Anti-Trust Act July 2, 1890, c. 64, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), there must be a contract, combination, or conspiracy which in purpose or effect tends to restrain trade or commerce among the states or to monopolize some portion thereof. There must be a meeting of the minds of two or more to accomplish some common purpose directly violative of the act or a purpose which will, whether intentionally or not, in effect constitute a restraint of trade and commerce among the several states.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

[428] **MONOPOLIES (§ 12)—WHAT CONSTITUTES—CONSTRUCTION OF ANTI-TRUST ACT.**—The mere extent of acquisition of business or property achieved by fair and lawful means cannot be the criterion of monopoly within the meaning of Anti-Trust Act July 2, 1890, c. 647, § 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200); but in addition to acquisition and acquirement there must be an intent by unlawful means to exclude others from the same traffic or business, or from acquiring by the same means property and material things.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

For other definitions, see Words and Phrases, vol. 5, pp. 4570-4574.]

**MONOPOLIES (§ 24)—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE—SUIT FOR INJUNCTION—SUFFICIENCY OF EVIDENCE.**—Evidence considered in a suit by the United States against various railroad and coal companies engaged in the production and transportation of anthracite coal in Pennsylvania, charging defendants with having entered into a general combination and conspiracy to restrain and monopolize the production and transportation in interstate commerce of anthracite coal, and to control its price in violation of Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), and held insufficient to establish such charge.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.]

*(Per Buffington, Circuit Judge.)*

**MONOPOLIES (§ 12)—RESTRAINT OF INTERSTATE COMMERCE—CONTRACT OR COMBINATION RESTRICTING COMPETITION—"RESTRAINT OF TRADE."**—One of the purposes of Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), in making illegal

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every contract, combination, or conspiracy in restraint of trade or commerce among the several states, is to maintain interstate commerce on the basis of free competition, and any contract, combination, or conspiracy, the purpose or direct effect of which is to restrict such free competition by way of transportation or otherwise, is in restraint of interstate commerce and unlawful.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

For other definitions, see Words and Phrases, vol. 7, pp. 6185, 6186.]

**EQUITY (§ 330)—PLEADING—MULTIFARIOUSNESS OF BILL—WAIVER.**—The failure of defendants to object to a bill on the ground of multifariousness until final hearing, or until after complainant has taken his proofs, is a waiver of objection, and, while the court on such hearing may of its own motion dismiss the bill, it will not do so if that objection does not embarrass or prevent the decreeing of relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 663; Dec. Dig. § 330.]

**MONOPOLIES (§ 16)—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE—COMBINATION TO PREVENT BUILDING OF COMPETING RAILROAD.**—A combination between railroad companies for the avowed purpose and with the effect of preventing the threatened building of a competitive road for the transportation of coal in interstate commerce, by purchasing, through a corporation, the stock of which they purchased, large coal properties, the prior owners of which had pledged their tonnage to the projected road, thus retaining to certain of the combined roads such tonnage and the tonnage of other coal operators tributary thereto who had no other means of transporting their product, was a combination in restraint of trade and commerce among the several states, and unlawful under Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. [429] St. 1901, p. 3200), against which the United States is entitled to injunctive relief under section 4 of the act. Lanning, Circuit Judge, dissenting on the pleadings and evidence.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. § 16.]

**MONOPOLIES (§ 12)—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE—LEGALITY OF SEPARATE ACTS.**—The fact that the several acts by which the purpose of a combination in restraint of trade and commerce among the several states is effected are, taken in isolation, lawful or intrastate in character, and not within the purview of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), does not relieve the combination from illegality; but such acts must be viewed as elements of a whole and in the light of their purpose and effect in combination.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

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*(Per Lanning, Circuit Judge.)*

**MONOPOLIES (§ 16)—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE—CONSOLIDATION OF RAILROADS.**—The purchase by one railroad company of the stock of another by issuing and exchanging its own stock therefor, both roads being at the time carriers of anthracite coal from Pennsylvania to New York Harbor, but chiefly from different localities, *held* not to constitute a combination in restraint of interstate commerce in such coal, unlawful under Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200); it appearing that the main object of the consolidation was the betterment of the terminal facilities of both roads at New York City and Harbor, which were largely improved thereby to the benefit of the public, and that their competition in the coal carrying business was slight, and the effect, if any, on such competition merely incidental.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. § 16.]

**MONOPOLIES (§ 16)—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE—CONSOLIDATION OF RAILROADS.**—The purchase by one railroad company of a controlling interest in the stock of another, which was a competitor in the carrying of anthracite coal between the mines and New York Harbor, did not constitute a combination in restraint of interstate commerce in such coal, or to monopolize such commerce, unlawful under Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), where the predominating motive in the purchase was to preserve traffic arrangements which were very important to the purchasing company, by preventing the purchase of such stock by another company, although its necessary incidental effect was to eliminate competition between the two roads in the coal carrying business.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. § 16.]

In Equity. Suit by the United States against the Reading Company and others. Decree granting the relief prayed for in part, and for defendants in part.

*J. C. McReynolds* and *G. Carroll Todd*, Special Assistants to the Attorney General, for the United States.

*Robert W. De Forest*, *Samuel Dickson*, and *Jackson E. Reynolds*, for Central R. R. of New Jersey and Lehigh & Wilkes-Barre Coal Co.

*Alexander and Green*, for Mercantile Trust Co.

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[430] *Charles Heebner, J. D. Campbell, and John G. Johnson*, for Philadelphia & R. Ry. Co., Philadelphia & R. Coal & Iron Co., and Reading Co.

*Willard, Warren and Knapp*, for Temple Iron Co.

*J. Claude Bedford*, for St. Clair Coal Co.

*James H. Torrey and William S. Opdyke*, for Delaware & Hudson Co.

*Welles and Torrey*, for Enterprise Coal Co., North End Coal Co., and Green Ridge Coal Co.

*R. H. Patterson*, for People's Coal Co.

*Thomas F. Wells*, for Pine Hill Coal Co. and Nay Aug Coal Co.

*W. W. Watson*, for Austin Coal Co.

*Henry W. Palmer*, for Parrish Coal Co.

*Frank H. Platt, J. F. Schaperkotter, and George W. Field*, for Lehigh Valley R. Co. and Lehigh Valley Coal Co.

*Adelbert Moot, George F. Brownell, and Herbert A. Taylor*, for Erie R. Co., New York, S. & W. R. Co., New York, S. & W. Coal Co., Pennsylvania Coal Co., Hillside Coal & Iron Co., and Clarence Coal Co.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

GRAY, Circuit Judge.

The proceedings in this case were begun by a petition in the nature of a bill in equity, filed June 12, 1907, on behalf of the United States, under section 4 of the act of Congress of July 2, 1890, commonly known as the "Anti-Trust Act," against the defendants named above. Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3201). The petition invokes the jurisdiction of this court to prevent and restrain the alleged violation by the defendants of sections 1 and 2 of said act of Congress. The defendants are all

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alleged to be corporations duly created under the laws of the states of Pennsylvania, New York and New Jersey, respectively.

In its first paragraph, the petition alleges that the defendants, the Philadelphia & Reading Railway Company, the Lehigh Valley Railroad Company, the Delaware, Lackawanna & Western Railroad Company, the Central Railroad Company of New Jersey, the Erie Railroad Company, and the New York, Susquehanna & Western Railroad Company (called the defendant carriers when referred to collectively), are common carriers engaged in interstate transportation, particularly in the transportation of anthracite coal from the mines of Pennsylvania to the markets of that and other states. It alleges that the defendants, the Philadelphia & Reading Coal & Iron Company, the Lehigh Valley Coal Company, the Lehigh & Wilkes-Barre Coal Company, the Pennsylvania Coal Company, the Hillside Coal & Iron Company, and the New York, Susquehanna & Western Coal Company (called the defendant coal companies), own and operate anthracite coal mines in the state of Pennsylvania, and "buy, sell and otherwise deal in anthracite coal in the markets of the several states"; that the defendant, the Temple Iron Company, also owns and operates anthracite mines in the state of Pennsylvania; that the defendant, the Reading Company, is the holding corporation of the Reading System, [431] and holds the entire capital stock of the Philadelphia & Reading Railway Company and of the Philadelphia & Reading Coal & Iron Company, and a majority in interest of the capital stock of the Central Railroad Company of New Jersey.

In its second paragraph, it is alleged that, save the Pennsylvania Railroad Company and the New York, Ontario & Western Railroad Company, and the line of the Delaware & Hudson Company, the defendant carriers operate the only lines of railroad that penetrate the anthracite coal regions, and, with the exception stated, furnish and control the only means of transporting anthracite coal from the mines in Pennsylvania to the markets and distributing points in that and other states, particularly the great markets and distributing points at tide water in the vicinity of New York.

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The third paragraph of the petition alleges that the Reading Company, the holding corporation of the Reading System, which holds the entire capital stock of the Philadelphia & Reading Railway Company, also holds the entire capital stock of the Philadelphia & Reading Coal & Iron Company; the Lehigh Valley Railroad Company owns all the capital stock of the Lehigh Valley Coal Company; the Central Railroad Company of New Jersey owns nine-tenths of the capital stock of the Lehigh & Wilkes-Barre Coal Company; the Erie Railroad Company owns all the capital stock of the Pennsylvania Coal Company and a large majority of the capital stock of the Hillside Coal & Iron Company; and the New York, Susquehanna & Western Railroad Company owns nearly all of the capital stock of the New York, Susquehanna & Western Coal Company; and that these so-called "subsidiary" coal mining companies (the defendant coal companies herein) are controlled by or in the interest of the defendant carriers, or some of them, through the ownership of controlling stock interests.

The fourth paragraph of the petition, after stating that anthracite coal is an article of prime necessity and universally used for domestic purposes throughout New England and the Middle Atlantic States, and that the source of the entire supply, save a few small deposits of inferior quality, is located in the state of Pennsylvania, in an area of about 484 square miles, divided for trade purposes into three regions, viz., the northern or Wyoming (sometimes called the Lackawanna) region, the middle or Lehigh region, and the southern or Schuylkill region, alleges that the defendant carriers and the Reading Company, either directly or through the said defendant coal companies, own or control 90 per cent. approximately, of the entire unmined area of anthracite, distributed substantially in the following proportions, to wit:

|   | Per cent.    |
|---|--------------|
| Reading Company .....                             | 44. 00       |
| Lehigh Valley Railroad Company .....              | 16. 87       |
| Delaware, Lackawanna & Western Railroad Co. ....  | 6. 55        |
| Central Railroad Company of New Jersey .....      | 19. 00       |
| Erie Railroad Company .....                       | 2. 59        |
| New York, Susquehanna & Western Railroad Co. .... | . 54         |
|   | <hr/> 89. 55 |

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[432] —and that they produce, either directly or through the agency of these coal companies, from 70 to 75 per cent, approximately, of the annual supply of anthracite. There are, however, it is alleged, a large number of independent individual firms and corporations who mine anthracite, either from their own properties or from properties leased by them, and who would be free from the control of the defendant carriers, were it not for the unlawful contracts hereinafter referred to; that these independent operators produce, approximately, from 20 to 25 per cent of the annual supply of anthracite (the residue being produced by the anthracite carriers not parties hereto), which would come in competition in the great distributing centers with the anthracite produced by the defendant carriers, or their so-called agencies, the defendant coal companies, were it not for the unlawful contracts, combinations and conspiracies hereinafter charged and set forth, which stifle competition between the several defendant carriers, or their so-called agencies, in the sale of anthracite coal throughout the several states, and between such defendant carriers, or their so-called agencies, and the aforesaid independent operators.

Paragraph 5 alleges that that part of the anthracite output not consumed in the state of Pennsylvania, is carried chiefly to tide water at New York Harbor, and is thence distributed by water and by railroad to points in the New England and Middle Atlantic States; that New York Harbor is the principal distributing point for anthracite coal, and that the price in that market fixes or regulates its price in the markets of the several states which get their supply through New York Harbor points.

Paragraph 6 sets forth the attempted lease, in January, 1892, by the Lehigh Valley Railroad Company and by the Central Railroad Company of New Jersey, as lessors, of their respective railroads and coal properties, to the Philadelphia & Reading Railroad Company, predecessor of the present defendant, as lessee, for the period of 999 years; and that by the decree of the chancellor of the state of New Jersey, said lease of the properties of the Central Railroad Company was adjudged to be null and void, and that, in consequence

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thereof, the lease between the Philadelphia & Reading Railroad Company and the Lehigh Valley Railroad Company was rescinded.

The gist of the petition and its charging part are set forth in the seventh paragraph thereof. Its general charge of combination and conspiracy is thus set forth:

"The average price of anthracite coal at tide water, taking for illustration the stove size, which rose from \$3.71 and \$3.85 a ton in 1890 and 1891, respectively, prior to the leases just described, to \$4.15 and \$4.19 a ton in 1892 and 1893 respectively, the years during which the said leases were in force, again declined, under the influence of competition, in the years immediately following the cancellation of the leases, falling to \$3.60 a ton in 1894 and \$3.12 a ton in 1895. Whereupon, in violation of the provisions of sections 1 and 2, respectively, of an act of Congress, approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 209), the defendant the Reading Company, and the defendant carriers and the defendant coal companies, owning or controlling 90 per cent, more or less, of all the anthracite deposits, and producing 75 per cent, more or less, of the annual anthracite supply, and controlling all the means of transportation between the anthracite mines and tide water, save the rail[433]roads operated by the Pennsylvania Railroad Company and the New York, Ontario & Western Railway Company, which, as aforesaid, reach only a limited number of collieries, entered into an agreement, scheme, combination, or conspiracy, by virtue whereof they acquired the power to control, regulate, restrain, and monopolize, and have controlled, regulated, restrained and monopolized, not only the production of anthracite coal, but its transportation from the mines in Pennsylvania to market points in other states and its price and sale throughout the several states, with the result that competition in the transportation and sale of anthracite coal has been wholly suppressed, and the price thereof to consumers greatly enhanced. As steps in the development of this illegal combination, and in furtherance of its illegal purposes, the defendants herein named, or some of them, engaged in and became parties to the following additional acts, schemes and contracts, among others, in violation of the aforesaid act of July 2, 1890," etc.

These "additional acts, schemes and contracts," alleged to be steps in the development of this illegal combination, in violation of the act, are then set forth in said paragraph. They are four in number, and are referred to as (a) the 65 per cent contracts, (b) the absorption by the Erie Railroad



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Company of the New York, Susquehanna & Western Railroad Company, (c) the acquisition by the Reading Company of the majority of the shares of the Central Railroad Company of New Jersey, (d) the Temple Iron Company transaction, and (e) the acquisition by the Erie Railroad Company, while controlling the Hillside Coal & Iron Company, of all the shares of the Delaware Valley & Kingston Railroad Company, a projected competing carrier, and all the shares of the Pennsylvania Coal Company, a competing producer.

All of the above named defendants, both carrier and coal companies, have filed their answers to the petition, and the Hillside Coal & Iron Company demurred generally for want of equity, and specially for multifariousness. These answers are several and separate, and each of them denies any participation in any combination or conspiracy, as charged against all the defendants in the seventh paragraph of the petition, and all knowledge or information in regard to the same. The separate acts charged against various groups of the defendants, as steps towards the alleged general conspiracy, and as independently unlawful, are also denied by those defendants, respectively, against whom the charge is made.

After the filing of the answers, the petitioner, by leave of the court, amended its original petition, by adding as defendants therein a large number of independent coal producers, operators and mine owners, as being parties to the so-called 65 per cent contracts with all or some of the original defendants.

Issue having been joined by replication duly filed by the petitioners, evidence was taken at great length on behalf of both the government and the defendants, and the case is now before us on final hearing.

The provisions of the act of Congress, of July 2, 1890, with which we are here concerned, are contained in sections 1, 2, and 4 of said act, and are as follows:

"SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a

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misdemeanor, and, on conviction thereof, [434] shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize, or combine, or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

\* \* \* \* \*

"Sec. 4. The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

The theory of the government's case, as stated by the learned and able counsel who represented it, is that all the original defendants have long been parties to a general combination and conspiracy which stifles competition and obstructs trade and commerce among the states in anthracite coal, to which the separate acts charged against various groups of the same defendants are referable as steps towards the common goal; and further, that these separate acts of the various groups are independently in violation of the act of Congress, and contributing as they do to the same end, that all the defendants, parties to some of them, would properly be embraced in one petition, though there were no general combination or conspiracy to which each might be referred.

Counsel for the petitioner have dwelt at great length upon the somewhat peculiar conditions now and for a long time past obtaining in the production and transportation of coal

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in the anthracite region of Pennsylvania, and counsel for the defendants have referred to the history, as shown by the evidence, of the development of coal production and transportation in that region, and the necessary and fostering care exercised by the state in promoting that development. This development has necessarily been influenced by the peculiar natural features, topographical and geographical, which characterize the anthracite region, and it is doubtless true that the present situation of trade and traffic in anthracite coal is largely the outgrowth of these antecedent conditions.

The knowledge of the availability of anthracite coal as a fuel for domestic and industrial purposes, antedating as it did the railroad era, was not utilized for want of transportation facilities, and after the beginning of that era, for the want of capital for the building of railroads and the mining and preparation of the coal for use. The requirement of such capital was enhanced by the fact that the production of anthracite coal differed from that of bituminous coal, in that the former, after it was mined, required to be broken up before it was marketed into assorted sizes, by means of expensive machinery called "breakers."

[435] The transportation of anthracite coal to the more distant markets of Pennsylvania and adjoining states, was at first accomplished by the construction of canals by those owning the coal properties. The public policy of the state of Pennsylvania, for obvious reasons, favored such construction. This public policy also extended to the construction of railroads from convenient shipping points to different parts of the anthracite region. This policy is exemplified by the acts of Assembly of the state of Pennsylvania, between the years 1823 and 1871, which expressly conferred upon the Delaware & Hudson Company the same authority which was conferred upon it in its act of incorporation in the state of New York, April 23, 1823 (Laws 1823, c. 238), "to construct a canal or water navigation from the anthracite coal district in Pennsylvania to the Hudson river in New York, to purchase lands in Pennsylvania containing stone or anthracite coal; and to employ its capital in the business of transporting to market

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coal mined from such lands." This authority was afterwards extended to the construction and acquisition of railroads for the same general purpose of transporting coal from the coal lands owned by said company. The same is in general true of the other defendant carriers. Under and in deference to the same general policy, the roads of the other defendant carriers were constructed, either by the present corporations or their predecessors in title, as also were established the defendant coal companies which grew up under the auspices or ownership of the defendant carriers, respectively, each coal company producing or marketing the coal over the railroad to which the mines from which it was produced were contiguous or naturally tributary. These coal companies were organized from time to time under acts of Assembly of the state of Pennsylvania, with authority to mine and sell coal and to acquire coal lands for that purpose. Moreover, by an act of Assembly of the state of Pennsylvania, approved April 15, 1869 (P. L. 31), entitled "An act to authorize railroad and canal companies to aid in the development of the coal, iron, lumber and other material interests of this commonwealth," such railroad and canal companies were authorized to aid corporations engaged in developing coal, iron, lumber, and other material interests of Pennsylvania, by the purchase of their capital stock and bonds, or either of them.

The anthracite coal deposits of Pennsylvania are found in three quite distinct and separate fields or regions—the upper, or Wyoming, region extending in a northeast and southwest direction, and of comparatively narrow width, for a distance of 50 or 60 miles, partly on both sides of the Susquehanna river as it runs from the northeast to the southwest, containing 176 square miles in Lackawanna and Luzerne counties; the middle or Lehigh region containing 127 square miles in Luzerne, Schuylkill, Columbia and Northumberland counties; and the southern or Schuylkill region, in Schuylkill, Dauphin and Carbon counties, containing 181 square miles. Scranton and Wilkes-Barre are the principal towns of the Wyoming region, Hazleton of the Lehigh region, and Pottsville of the Schuylkill region. In each of these regions, there are many

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collieries and plants for preparing coal, including those owned and operated by the defendant coal companies or carriers, as well as by so-called independent coal companies [436] and operators. Into each of them run one or more of the defendant carrier companies, which, with some other companies not defendants, collect and carry the coal adjacent to their lines, respectively, by means of the spurs and branches constructed from such lines to the various mines and collieries. Naturally, each railroad line carries the coal from that part of the coal region adjacent to it or conveniently reached by its spurs and branches.

From one of the tables filed as a government exhibit, we take the following statement of the shipments of anthracite coal carried by the defendant railway companies, and two others, as initial transportation lines during 1907, and the proportionate percentage of the whole carried by each:

| Railroad                          | Gross tons. | Per cent. |
|-----------------------------------|-------------|-----------|
| Phila. & Reading Ry.....          | 14,018,796  | 20.89     |
| Lehigh Valley Railroad.....       | 11,532,255  | 17.18     |
| Central R. R. of New Jersey.....  | 8,714,113   | 12.99     |
| Del. Lackawanna & West. R. R..... | 10,237,419  | 15.25     |
| Delaware & Hudson Company.....    | 6,562,768   | 9.78      |
| Pennsylvania Railroad.....        | 8,203,271   | 9.24      |
| Erie Railroad.....                | 7,151,683   | 10.66     |
| New York, Ontario & West. Ry..... | 2,689,069   | 4.01      |
|                                   | 67,109,393  | 100.00    |

It appears from the exhibits and testimony produced by the petitioner, that approximately 12 per cent of the total production of coal in the anthracite region is not shipped away, but is consumed at local points and in the operation of the mines, and that, taking the year 1905 as a normal year, it would appear that, of the coal that was shipped away from the mines, about 25 per cent was carried to tide water points in New York Harbor, and of the balance, about 20 per cent was consumed within the state of Pennsylvania and 55 per cent shipped to points outside the state, other than those at tide water in New York Harbor.

As averred in the petition, and as appears in the agreed statement of facts, the distribution of coal lands among the

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principal holders at the time of filing the petition was as follows:

| Names of holders:                                  | Area<br>possessed<br>acres. |
|--|-----------------------------|
| The Del., Lackawanna & West. R. R. Co.....         | 17,353                      |
| The Delaware & Hudson Co. and subsidiaries.....    | 25,180                      |
| Hillside Coal & Iron Company.....                  | 13,466                      |
| The Pennsylvania Coal Company.....                 | 13,900                      |
| The New York, Susquehanna & West. Coal Co.....     | 963                         |
| Scranton Coal Company.....                         | 2,695                       |
| Elk Hill Coal & Iron Company.....                  | 3,049                       |
| Lehigh & Wilkes-Barre Coal Company.....            | 15,650                      |
| The Temple Iron Company and subsidiaries.....      | 4,465                       |
| Susquehanna Coal Co. and affiliated companies..... | 16,867                      |
| Lehigh Valley Coal Company.....                    | 37,047                      |
| Coxe Bros. & Company, Inc.....                     | 5,311                       |
| Philadelphia & Reading Coal and Iron Co.....       | 98,077                      |
| Lehigh Coal & Navigation Company.....              | 13,783                      |
| Total.....   | 267,806                     |
| Total coal area (484 square miles).....            | 309,760                     |

[437] Of these, the Delaware & Hudson Company and its subsidiaries, the Scranton Coal Company, the Elk Hill Coal & Iron Company, the Susquehanna Coal Company and affiliated companies, and the Lehigh Coal & Navigation Company, whose ownership aggregates 61,574 acres, are not defendants in this proceeding, as participants in the general combination or conspiracy charged by the petition against the original defendants therein named. This would leave about two-thirds in area of the coal lands of the anthracite region in the ownership or possession by lease, or otherwise, of the defendant companies. As appears from the undisputed testimony of the defendants, these present holdings of coal lands have resulted from acquisitions made through a long period of years by the companies named respectively, or their predecessors in title, beginning, in the case of some of the largest holders and in respect to the larger part of the acquisition, long prior to 1874. The gradual growth of these acquisitions and the consequent development of the present situation, it is contended by the defendants, have been induced by natural causes, such as the geographical and topographical features of the anthracite coal region,

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which have presented serious obstacles to the construction of railroads with which it was sought to penetrate the different coal fields of the anthracite region, and which have enhanced enormously the cost of their construction; that in the earlier periods of the development of this region, when the mines and the production of coal were more largely in the hands of individuals and small corporations, the business of mining and marketing coal was wasteful and often resulted largely in the failure or bankruptcy of those concerned therein. The individual exploiter skimmed the cream, so to speak, of his coal lands, and, unable to meet the expense of practicing the economies necessary to their full development, the mines were not infrequently abandoned, and of this abandonment, deterioration or ruin was the natural result. That, latterly, the recurrence of strikes and labor troubles have contributed to the difficulties of the situation. That these strikes and labor troubles extended to all the coal mining and coal shipping operations of the whole region, affecting all producers, great and small alike, and that the solidarity of the labor unions compelled a joint agreement, embracing all engaged in mining operations as to the terms of settlement. That since the last settlement in 1902-3, there has resulted a condition of comparative industrial peace in the anthracite region. That this condition, together with the increased demand for and the consequent increased price of coal have regulated, without destroying, the natural competition of the great carrying and producing companies. That many economies in the production and sale of coal have been made possible, wasteful production largely done away with, and, more than all, a wise and scientific conservation of the future supply of this necessity of modern life has been brought about, to the infinite advantage of the public and of those connected with the production of coal, whether as capitalists or laborers.

It is further urged by the defendants, that the destruction of present conditions and methods attending the production and sale of coal, [438] will produce a deplorable anarchy in the trade, and involve in confusion and financial loss all those engaged therein, a confusion and loss by which the consumer is bound to suffer.

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This may all be admitted. Counsel for the petitioner, indeed, do not undertake to deny, as it is unnecessary that they should, any of these statements. They are only pertinent as challenging by their importance the careful consideration by the court of the issues involved in the case before us.

The general situation being as thus briefly indicated, the defendant railway carriers and defendant coal companies are charged by the petition, as above stated, with having, in violation of the provisions of sections 1 and 2 of the act of Congress, approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" at a time not definitely stated, but presumably shortly after the year 1895, "entered into an agreement, scheme, combination or conspiracy, by virtue whereof they acquired the power to control, regulate, restrain and monopolize, and have controlled, regulated, restrained and monopolized, not only the production of anthracite coal, but its transportation from the mines in Pennsylvania to market points in other states, and its price and sale throughout the several states, with the result that competition in the transportation and sale of anthracite coal has been wholly suppressed and the price thereof to consumers greatly enhanced." For specific details of time, place and circumstance of this somewhat vague and indefinite charge, we must of course look to the evidence adduced by the petitioner. In saying that the time fixed for the entering into the combination and conspiracy charged, is presumably shortly after 1895, reference is made to the statements of the petition introductory to the charge above quoted. These statements having set forth the attempted lease, in 1892, by which the Philadelphia & Reading Railroad Company, as lessee, was to take over the railroad and coal properties of the Lehigh Valley Railroad Company and of the Central Railroad Company of New Jersey, the lessors, for a period of 999 years, and that the same was set aside by a decree of the chancellor of the state of New Jersey, in 1893, at the suit of its Attorney General, adjudging the same to be null and void, the petition avers that the price of stove size of anthracite coal at tide water, which rose from



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\$3.71 and \$3.85 a ton in 1890 and 1891 respectively, prior to the leases just described, to \$4.15 and \$4.19 a ton in 1892 and 1893, respectively, and again declined in the years immediately following the cancellation of the leases to \$3.60 a ton in 1894 and \$3.12 a ton in 1895. Whereupon, the petition charges that the defendants entered into the combination and conspiracy as above recited. The conclusion is thus sought to be drawn by the petitioner, that the motive of the combination and conspiracy about to be charged was the fall in the price of stove coal that occurred in 1895, and that the time at which it was entered into was shortly thereafter.

Accordingly, as being direct evidence of the general conspiracy charged, we are referred to the testimony touching what is alleged to be an express agreement or arrangement entered into between the [439] presidents of the defendant carriers, on January 23, 1896, and spoken of as "the presidents' percentages."

Joseph A. Harris, one of the first witnesses produced on behalf of the petitioner, was president of the Philadelphia & Reading Railroad Company from 1893 to 1895, when he became one of the receivers appointed by this court of the said railroad, and of the coal and iron company, and after the reorganization in 1897, president again of the Reading Railroad Company, the Reading Company, and the Reading Coal & Iron Company, until 1901, when he retired. He was called to testify, and was questioned at great length as to certain alleged agreements between the defendant carriers and coal companies in 1876, 1884, 1885 and 1886, by which the coal tonnage of the different roads was to be apportioned among the several roads and restricted to certain percentages of the whole. To repeated questions, he answered that he had no recollection at all in regard to such agreements ever having existed. He was then questioned as to certain testimony given by him in a suit by the state of Pennsylvania against certain of these companies in 1886, as to all of which he replied that he had no recollection of having given the testimony referred to, and when read to him, that it did not refresh his memory. The same course was pursued in regard to the proceeding before the Interstate Commerce Commis-

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sion, in which he is said to have testified with the same result. This course of questioning was pursued, and to reiterated leading questions, he repeatedly declared that he had no recollection and did not believe that any such agreements between the defendant companies as he was being interrogated about had ever existed. The examination then continues as follows:

"Q. Coming now to the year 1896, while you were president of the Philadelphia & Reading Railroad Company, give us the substance of the agreement between the presidents of the anthracite coal roads entered into at that time, establishing what were thereafter commonly called 'presidents' percentages.'—A. I do not know anything about it.

"Q. Have you never heard of the 'presidents' percentages'?—A. I have never heard of the 'presidents' percentages.' I never heard the term.

"Q. What was the agreement entered into by the presidents of the railroads in 1896, in reference to allotting to each interest a certain percentage of the total output of coal?—A. I do not know. I do not remember that there was any agreement at all. Have you anything there to refresh my memory?

"Q. In 1896, was there not a meeting of the presidents of the coal carrying roads, in which the question of the allotment of tonnage was discussed?—A. That I do not remember at all.

"Q. Do you remember no discussion in reference to that matter between the presidents of the various coal carrying roads?—A. No; if you will give me the papers, I will look over them and tell you.

"Q. This is your testimony which was taken in the investigation before the Interstate Commerce Commission (referring to testimony).—A. I no doubt gave my testimony correctly then.

"Q. You were asked: 'You do recollect, do you not, that there was a time when that matter (referring to the distribution of tonnage among the coal carrying roads) came up for discussion among the presidents of the coal carrying roads?' and you replied, 'What question came up? Q. The question of the division of the business of carrying coal—the question of the division [440] of the anthracite coal into certain percentages?' you saying, 'Understanding as to what share of the business each road was legally entitled to? Q. Yes, if that makes it clearer,' and then you answered that, 'Yes.'

"Judge CAMPBELL. I think the witness's attention should be called to the whole of his examination and cross-examination, because he may have, and probably did on further recollection or refreshment of his memory, made a very material change in the substance of his testimony.

"By Mr. McREYNOLDS:

"Q. Have you any recollection of those meetings at all?—A. I have no recollection of them at all; no. If I were to see these minutes or

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to read them, I might remember them. I have no doubt that what I testified to there was true. That is all I can say.

"Q. From 1896 down to the time when you left the Reading Railroad Company, was there not a general understanding between you and the various presidents of the coal carrying roads, as to what percentage each one should be entitled to?—A. There was not a general understanding, because it was the subject of a great deal of contest. I do not believe, so far as my recollection goes, that there was ever any agreement made at all.

"Q. Please read this testimony that you gave before the Interstate Commerce Commission in 1903, commencing on page 1570, for three or four pages, and see if it refreshes your recollection on that subject.—A. (After reading testimony). I notice I said then, as I say now, that it was too far away for me to recollect any of the details of that meeting. It has been long years since, and my memory has not been refreshed. I think this testimony of mine, from page 1572 to page 1575, is all correct.

"Q. Having read that, do you not remember that there was a meeting in the year 1896?—A. I only remember it by these papers.

"Q. Having refreshed your recollection about that, do you not remember that there was a meeting in the year 1896 of the presidents of the anthracite coal carrying roads, at which they came to a general understanding about the amount of the proportion of the total output which should be allotted to each?—A. Yes.

"Q. What was the percentage at that time allotted to the Philadelphia and Reading interest?—A. Twenty and a half, it appears from this testimony.

"Q. And each of the other roads had some percentage of a similar character allotted to them?—A. Yes; I say here in this testimony, 'there was never any binding agreement'—I thought there was not—'as can best be shown by the statistics at that time. There never was a year when that understanding was kept or nearly kept and as a general statement of what would be fair and reasonable, there was never a single year when there was an approach to it.' There is a general statement, and that is correct.

"Q. There was, however, a general understanding among the parties, that they should each endeavor to produce a given percentage which was allotted?—A. Yes, sir."

(See Record, vol. 2, pp. 25, 26.)

Mr. Harris is a gentleman highly respected in the community in which he lives, but the activities of his useful life have long since ceased. He is pressed again and again with questions, the answers to which only disclose a want of recollection as to matters suggested therein. His testimony, as quoted above, in regard to the so-called "presidents' percentages," falls short of supporting the general conspiracy

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charged in the petition, not only on account of the manifest infirmity of the witness's memory, but also on account of the substance of the testimony itself.

[441] A copy of the testimony of one Alfred Walter, who at one time was president of the Lehigh Valley Railroad Company, given in a proceeding against some of these same defendants before the Interstate Commerce Commission, begun in 1902 on the petition of William R. Hearst, and certified before the secretary of said Commission, has been introduced into this case by the petitioner. Mr. Walter's deposition is an exceedingly long one. That part of it to which we are especially referred by counsel for the petitioner, is as follows (see Government Exhibit No. 159, vol. 3, Record, p. 377):

"Mr. SHEARN. Have you not stated and is it not a fact, Mr. Walter, that the Lehigh Valley Coal Company during your administration did not produce and sell to tide water as much coal as it was capable of producing and marketing?

"Mr. WALTER. I do not think I said anything like that.

"Mr. SHEARN. Well, you used to receive Ruley's report, did you not?

"Mr. WALTER. Yes.

"Mr. SHEARN. And you used to see on those reports the heading, 'tonnage based on the presidents' percentages,' did you not?

"Mr. WALTER. Yes.

"Mr. SHEARN. What did that mean to you?

"Mr. WALTER. That meant the question of the shipping of coal and not the sale of coal. You have the two mixed.

"Mr. SHEARN. Changing the form of the question, then, was there during this period an understood arrangement between the presidents of the different companies as to the proportion of anthracite tonnage to be shipped over each of the railroads?

"Mr. WALTER. Yes.

"Mr. SHEARN. And when was that understanding arrived at; when was it reached?

"Mr. WALTER. Oh, I do not remember.

"Mr. SHEARN. Was that not in January, 1896?

"Mr. WALTER. I think it was; yes. I think so."

Afterwards, on cross-examination, however, he testified as follows:

"Mr. GOWEN. You have just spoken of these figures that were called the 'presidents' figures,' having to do with the relative tonnage over various roads, and you spoke of the matter as having originated in 1896. At that time, you had no connection with the Lehigh Valley road?

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" Mr. WALTER. No.

" Mr. GOWEN. You do not know anything about how the figures started?

" Mr. WALTER. I was not president of the Lehigh Valley at that time.

" Mr. GOWEN. You had nothing to do with the coal business at that time?

" Mr. WALTER. No.

" Mr. GOWEN. During the time you were president of the Lehigh Valley Railroad Company, you were under no agreement or understanding which was binding on you, by which you undertook to regulate the percentage of shipments over the Lehigh Valley road? You could have decreased your percentage or run it up without violating any agreement?

" Mr. WALTER. Yes, sir.

The natural inference to be drawn from Mr. Walter's testimony, as well as that to be drawn from Mr. Harris's testimony, would seem to be that, for some time prior to January, 1896, as well as for some time thereafter, there had come to be what was generally thought a normal coal tonnage over the railroads respectively transporting anthracite coal, representing the capacity of the collieries in the regions tributary to those roads respectively, as derived from the reports of the Bureau of Statistics furnished to the railroad and coal companies [442] and the public generally. It would also seem from Mr. Ruley's testimony, as above quoted, that these supposititious percentages, which the so-called " presidents' percentages " of 1896 had by that time come to be, were not reported until January, 1901, in the monthly reports of the Bureau of Statistics, and were discontinued in May, 1903. Nor is it to be inferred, as it seems to be by the counsel for the petitioner, on page 57 of their brief, that immediately after the meeting of 1896, and not before, all the coal interests " reported to a common source their production and sale of coal "—that is, to the Ruley Bureau of Statistics. On the contrary, Mr. Ruley's testimony shows that from 1890, when he took charge of the Bureau, these reports had been regularly made of the tonnage carried by the roads respectively, as well as of the sales of coal and prices obtained by the various shippers.

The objection to the admission of the copy of Mr. Walter's testimony, as taken before the Interstate Commerce Com-

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mission, must be sustained. It is testimony taken before a body not judicial but administrative, in a proceeding between different parties, and with reference to non-identical issues. It is not authenticated or proven by any witness present at the time the testimony was taken. It is therefore not within the rules permitting the testimony of a witness taken in one proceeding to be used in another. The inclusion of this testimony in the record is to be regretted, as it is embarrassing to the court in considering the weight and effect of all the testimony on either side. It may be said that the testimony, as far as its substance goes, is in the same line with the other testimony on the part of the petitioner; but the barriers between what is competent and incompetent as testimony, cannot be broken down without creating confusion and exposing litigants to dangers from which they have a right to be protected.

The testimony of Mr. Ruley, of the Statistical Bureau, in respect to the so-called "presidents' percentages," is also referred to in support of the general conspiracy charge. This bureau was started by one Jones, in 1876, as a private enterprise in industrial statistics, and he sold his compilations, among others, to the defendant carriers, individually. In 1892, he sold out his business to Ruley, who has since carried it on, and whose work has been, and is now, recognized as authoritative by those interested in industrial statistics. It is no doubt true that his patronage or employment has come largely from the defendant carriers and defendant coal companies, who are more than any others interested in these statistics, and indeed, since 1902 and perhaps before, they seem to have been compiled in great part from the monthly returns made to the bureau by the defendant coal companies and the defendant carriers, severally, of the sales and shipments over the respective roads, and the price obtained for the different sizes of coal at tide water in New York Harbor. Mr. Ruley testifies that these compilations have been furnished each month to the press—that is, to the coal trade journals—and thus find their way to the office of every considerable wholesale or retail dealer in anthracite coal. He testifies that they are also furnished to the departments of the general and state governments. After the award made

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by the Anthracite Coal Strike Commission, in April, 1903. by which all the [448] defendant companies and other coal operators in the anthracite region, by agreement previously made among themselves, were jointly and severally bound, it became necessary, in order to carry out the award of the Commission, as to the sliding scale of wages fixed thereunder, to resort to the monthly compilations of this Statistical Bureau, in regard to average prices for certain grades of coal at tide water in New York Harbor.

From Mr. Ruley's testimony, it appears that the appellation "presidents' percentages" originated in one of the trade journals to which Mr. Ruley had contributed monthly tonnage reports. In his cross-examination, page 99, volume 2 of the record, we find the following:

"Q. You said the other day that you got the 'presidents' percentages' from the press, if I understood you correctly, or trade papers?—A. I said they were published there, *and that is the only source of information I had in mind.*"

(The italics are ours.)

"Q. Did you ever talk with any president about the thing, one way or the other?—A. No, sir."

He then refers to a Coal Trade Journal which had been published for 35 years by Mr. Saward, and in connection with this Trade Journal was a Coal Trade Annual, published by the same person. He said he had them with him as far back as 1890. Referring to the Annual of 1890, he is asked:

"Q. I find below, on page 11, 'Reducing the business done by each of the initial anthracite coal carriers to the basis of percentages, one may find that there are some interesting features attached thereto. Taking the years 1886-1888 (the latter being the latest official figures available) one finds that the Reading Company did an average of 20.55 per cent, the Lehigh Valley 17.78 per cent, the Central Railroad of New Jersey 14.91 per cent, the Delaware, Lackawanna & Western 17.36 per cent, the Delaware & Hudson 11.29 per cent, the Pennsylvania Railroad 11.22 per cent, the Pennsylvania Coal Company 4.55 per cent, and the Erie 2.27 per cent; this fairly represents the "ability to produce" of the several interests on collieries tributary thereto, whether the total output be 40,000,000 of tons annually or less.' Are you able to find anything earlier than that in any publication on the percentage basis?—A. I judge I could.

"Q. That is the earliest you did find?—A. The earliest I could find in the files.

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"Q. In other words, for a long time the statisticians had been dealing with tonnages on the percentage basis?—A. Yes.

"Q. What is the next one you have?—A. 1891. In 1896 there is quite an extensive report.

"Q. Is this report of 1896 one of the reports you had in mind the other day when you spoke of these presidents' percentages being published?—A. Yes, sir. \* \* \*

"Q. Without giving the monthly production and the shipments by the anthracite companies, and the production in each district, with its percentages, and the actual percentages of the whole shipments for the years 1890 to 1895, each year separately for the P. and R., the L. V., the C. R. R. of N. J., the D. L. & W., the D. & H., the P. R. R., the P. C. Co., the Erie, the O. & W., and the D. S. & S., on page 21—are these figures which you furnished originally to these publications yourself?—A. Yes.

"Q. You recognize these figures?—[444] A. I do not say I furnished the per centa. I furnished the tonnages on which the percentages are based.

"Q. I find this statement, 'There was held on the 23d of January, 1896, a meeting of the representatives of the several anthracite producing and carrying companies in order to come to some agreement in regard to trade conditions and its improvement. According to the figures presented at the meeting the tonnage of the different companies in 1895, as compared with 1894, is as follows: Then follows the statements of the companies and the production for 1895, and the per cent for 1894, and the changes of increase or decrease in percentages, the largest being a change of 1.45 per cent. This was referred to a committee to adjust, which a week later brought in a report recommending that for the period commencing February 1, 1896, and ending March 31, 1897, the following percentages should be adopted: Philadelphia & Reading 20.50, Lehigh Valley 15.65, Delaware, Lackawanna & Western 13.85, Central Railroad of New Jersey 11.70, Pennsylvania Railroad 11.40, Delaware & Hudson Canal Company 9.60, Erie Railroad 4, Pennsylvania Coal Company 4, Delaware, Susquehanna & Western 3.20, New York, Ontario & Western 3.10.' Now are these percentages and these statements the percentages and statements you had in mind about seeing them in print in the trade journals?—A. Yes.

"Q. Do you know of any earlier publication of the presidents' percentages, except in the journal of which this is a compilation?—A. No, sir; I do not.

"Q. And was it from these sources, or the original journal of which this is a compilation, from which you got the compilation from which you made your percentage reports and figures?—A. Yes."

He afterwards testifies that ever since he had been connected with the bureau, since 1890, these journals have been



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giving the details of the anthracite coal statistics, the details for the month and the details for each company, together with circular prices of the different companies for each grade of coal. So that it appears that the only knowledge that Mr. Ruley had of a meeting on the 23d of January, or of any meeting was the publication in the trade journal above quoted. As to the statement made in this publication, it is to be observed that the so-called agreement as to percentages of coal traffic to be distributed among the carrier companies, was to obtain for the period commencing February 1, 1896, and ending March 31, 1897, and that these percentages correspond very nearly with those reported in the same trade journal for the years 1886-1888. Counsel for the government rely upon Mr. Harris's testimony, that the understanding, such as it was, continued in force as long as he remained president of the Philadelphia & Reading. We do not think Mr. Harris's testimony, taken as a whole, will bear out this statement. Counsel also rely upon the fact that the reports of the Bureau of Anthracite Coal Statistics from January, 1901, to May, 1903, show a calculation of tonnages as they would be if based on the so-called presidents' percentages. Referring to government Exhibit No. 7, produced by Mr. Ruley as showing the form of these reports, we do not find that these percentages are spoken of as presidents' percentages at all, though they undoubtedly correspond with what were reported as having been adopted in the meeting of January 23, 1896, in the trade journal above referred to. Mr. Ruley's explanation of how they came to be included in his report, for what purpose, why he abandoned them [445] after May, 1903, and that he had no direction from any defendant to so include them, we think deprives their inclusion during the period mentioned of any evidential value, as claimed by the petitioner. In considering the question, whether the matter of the so-called presidents' percentages furnishes any foundation for the general charge of combination and conspiracy in restraint of trade, as set forth in the petition, we must consider also the testimony of the defendants.

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Mr. E. B. Thomas, president of the Lehigh Valley Railroad Company, testifies, first as to the general charge of the petition above referred to, as follows. The general charge having been read to him from the petition, he is asked:

"Q. Is that charge true or false?—A. It is not true.

"Q. Did you ever have any knowledge of any such scheme as that which is charged?—A. I never did.

"Q. Has there ever been any such agreement or scheme, or combination, or conspiracy between the defendants?—A. Never has. I have never known the time when every party in the trade was not at liberty to produce and transport all the coal he desired to, or that he could sell. If he could not sell it, he could throw it in the North River, if he wanted to.

"Q. Did that agreement, or any such agreement as that, or any agreement of that character, exist at the time charged in the complaint, or at the time of the commencement of this proceeding, June 12, 1907?—A. I never knew of any."

Coming to the question that the general conspiracy, as charged, was begun about the time of or at its origin in the arrangement of the so-called "presidents' percentages," on January 23, 1896, Mr. Thomas's testimony is as follows:

"Q. Some testimony has been offered by the complainant about a meeting, or some meetings, which were held in or about 1896, of the presidents of the anthracite railroads, at which there was an understanding, or an attempt at an understanding, between them as to percentages of product of anthracite coal to be carried by different railroads during that year. Were you present at any such meeting at that time?—A. Yes, I was present at a meeting where there was an attempt made to reach a tentative understanding as to the quantity of coal, proportion of coal, that each road would transport. It related entirely to transportation.

"Q. For how long a period was that under discussion? I mean, what was to be the period?—A. The period was to be a year. There was not enough percentage in a hundred to go around, to begin with.

"Q. What do you mean by that?—A. I mean to divide it into per cents, we had to put one hundred and one per cents as near as we could come.

"Q. In other words, there was some party or parties that were there that would not consent to the percentage that was talked about; is that right?—A. That is right.

"Q. And never did consent?—A. Never did consent to it. As far as I have any knowledge, I do not think anybody ever regarded it. It came about by reason of crowded terminals, the question of distribution of cars among shippers.

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"Q. I wish you would explain that more fully.—A. The individual operators claimed that, in times of scarcity of cars, we were favoring our own companies, or those controlled by the railroads, and that they were short of cars. There was an attempt to distribute the tonnage to be handled on colliery production. The individual shippers would [446] load up the cars and send them to tide water or to any other destination and allow them to accumulate and have no market for them. They crowded our terminals and then, when times came up that our own companies had not done the same, they claimed their same proportion of cars right along; and it was an endeavor to conduct the distribution of cars and movement of tonnage in a more orderly manner and in a more businesslike manner than it had previously been.

"Q. And to meet these complaints?—A. To meet these complaints.

"Q. And to enable the railroad companies to meet these complaints?—A. Precisely.

"Q. Was any demand made at that time, or was any suggestion of any demand made, to curtail the output of coal?—A. None whatever. I recollect George B. Roberts, who represented the Pennsylvania at that meeting, stating distinctly that he would not discuss any question of that kind or have anything to do with it; with which I heartily accorded. \* \* \*

"Q. The percentages which were considered at that time were the percentages which have sometimes been referred to in this testimony as the 'presidents' percentages'?—A. I assume that they were.

"Q. Did that understanding or talk ever go into effect as an agreement?—A. Never.

"Q. Was it ever put into operation?—A. I think some people tried to live up to it a little while, until they found the other fellow was not.

"Q. Was there ever any talk about continuing it after the first year?—A. Never.

"Q. By anybody?—A. There never was any meeting held after the first one, and I do not think there were any practical results out of that.

"Q. Has there at any time since, except as to this early attempt by some of them, been any observation by the companies of these percentages which were adopted at that time?—A. Not to my knowledge.

"Q. Has the Lehigh Valley Company ever observed them?—A. It has not."

Elsewhere, in speaking of these so-called "percentages," he says: "I do not think that tentative understanding entered into ever had any practical result." He speaks of it repeatedly as an abortive attempt on the part of the carriers to prevent congestion of cars at the water terminals and docks,

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and to regulate the distribution of cars at the colliers. He says, during the course of his testimony above quoted, that it was directed against a usage of the independent operators to load up long trains of cars, and to use the same to store up coal mined in advance of demand, but that whatever the purpose of the same was, it was not lived up to even for the year during which it was to be tried.

William Truesdale, another witness called by the defendants, at the time of testifying had been president of the Delaware, Lackawanna & Western Railroad Company since March 1, 1889. In the course of his examination, he testifies as follows:

"Q. What is meant by presidents' percentages?—A. I do not believe I am familiar enough with that matter to give any explanation of it. It is something that was arranged long prior to my connection with the Lackawanna Road, which had nothing to do with our affairs since then, if it ever had.

[447] "Did you ever enter into any agreement with any other person whereby the tonnage of the different coal carrying railroads was distributed according to certain arbitrary percentages?—A. There was never such an agreement that I recollect of since my connection with the Lackawanna Railroad.

"Q. Has there been any distribution of tonnage according to any percentage?—A. There has not.

"Q. Do you know what the alleged presidents' percentages are?—A. I know what is referred to by that.

"Q. The Delaware, Lackawanna & Western's percentage, I believe, is said to be———A. Thirteen and thirty-five one-hundredths per cent under those old percentages.

"Q. State whether or not the Delaware, Lackawanna & Western tonnage, since your connection with the railroad, has been maintained at about thirteen and thirty-five one-hundredths per cent?—A. No, sir. I think nearly every year we exceed that very much.

"Q. State whether or not, since your connection with the Delaware, Lackawanna & Western Railroad, you have produced all the coal that you could profitably sell?—A. We certainly have, and most of the time we operate our collieries to the limit of their capacity. \* \* \*

"Q. And you have sold that coal at the best price you could obtain for it?—A. We have."

W. A. Lathrop, a witness produced by the petitioner, had been in charge of the mines of the Lehigh Valley Coal Company between 1889 and 1901, and president of the Lehigh

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Coal & Navigation Company since March, 1907. In the course of his examination, he testified as follows:

"Q. Are the collieries of your company operated to their capacity throughout the year, and have they been since your connection with it?—A. Practically so. There are times during the summer when that is not done, because we cannot find the people to buy our coal. Except that, they are worked practically full time.

"Q. What proportion of the entire production of anthracite does your company put out?—A. I think the total production last year was about 67,000,000, as near as I remember, and our production was not quite 8,000,000. That would be about 5 per cent, a little less than 5 per cent.

"Do you endeavor to so operate your mines as to produce about that per cent from month to month of the entire output?—A. No, sir; we do not pay any attention to that.

"Q. You pay no attention to the output of the other companies?—A. We get out all the coal we can find customers for. We would be glad to get out more if we could find them."

Mr. George F. Baer, who testifies that he has long been familiar with the affairs of the predecessors of the present defendants, the Reading Company, the Reading Railway Company, and the Reading Coal & Iron Company, as counsel for and director in the same, in 1901 became president of the defendant companies above named. After stating that the Philadelphia & Reading Railway Company is not a competitor for the carriage of coal, which originates in the northern or Wyoming region and the Lehigh or middle region, and that the operations and holdings of the Philadelphia & Reading Coal & Iron Company are confined entirely to what is known as the lower and Schuylkill region, testifies as follows:

[448] "Q. Was there ever at any time, or is there now, anything in the nature of a division agreed upon or participated in by these defendants, of the tonnage carried by them?—A. None whatever. There is absolutely no division of coal tonnage and has not been to my knowledge during the period since my active connection with the system. During my administration, of which I can speak absolutely, there never was any division or attempted division of coal tonnage. We mine and market all the coal we can, without regard to what other companies are doing. It is as free and open a market, so far as that goes, as exists in any commodity in the world."

Taken in connection with the defendants' testimony, above quoted, it is not without significance too, that tables, filed as

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exhibits by the government, of the tonnages of the different defendant carriers after 1896, are utterly inconsistent with the existence of any pooling agreement. We take the following analysis of certain of these tables from the brief of the Lehigh Valley Railroad & Coal Companies. Taking the government's specimen report (Exhibit 7, vol. 3, p. 34) for the five months of 1903, it appears that over 1,500,000 tons, on which the freight at an average of \$1.24 per ton, amounted to about \$1,860,000, was carried by some railroads in excess of their allotments, provided the pooling agreement existed at that time. The want of conformity by the defendant carriers and others to the so-called "presidents' percentages," from 1896 to 1908, is more comprehensively shown in the table furnished by the Erie Exhibit No. 16, vol. 6, p. 455, exhibiting the yearly percentages of shipments of anthracite coal by the several transporting companies, from 1892 to 1908, inclusive.

Taking from this table only the figures for the years 1896 to 1908, they show that some railroads carried tonnage greatly in excess and others as much short of the tonnages allowable under the supposed pooling agreement, to wit:

|                     | Tons over. | Tons under. |
|---------------------|------------|-------------|
| Reading.....        |            | 2,480,883   |
| Lehigh Valley.....  |            | 1,705,615   |
| Jersey Central..... | 3,241,678  |             |
| D., L. & W.....     | 10,730,454 |             |
| D. & H.....         |            | 684,122     |
| Penna.....          |            | 12,185,543  |
| Erie.....           |            | 1,570,367   |
| O. & W.....         | 7,000,496  |             |
| D. S. & S.....      |            | 2,180,094   |
|                     | 22,041,028 |             |

That is to say, the three railroads, Jersey Central, Lackawanna, and Ontario & Western, violated the agreement, if it existed, by carrying over 22,000,000 tons more than they had right by the agreement to do. The earnings on this tonnage, at an average rate of \$1.24 per ton (see vol. 2, p. 690) would have been \$27,280,000, which represents approximately the amount that these three railroads obtained in earnings in excess of their right under the agreement, if it existed,

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and there is no evidence that any complaint was ever made by any of the companies on this account.

We are compelled to conclude that thus far the direct evidence relied upon by the government to show that all the before mentioned defendants have long been parties to a general combination and con[449]spiracy, commencing presumably in 1896 and continuing down to the filing of the petition, which stifles competition and obstructs trade and commerce among the states in anthracite coal, fails to establish that charge, and we turn now to a consideration of what may be called the indirect testimony adduced, from which it is contended the existence of such general conspiracy must be inferred. In this respect, we are called upon chiefly to consider the acts charged in the seventh paragraph of the petition to have been committed by certain groups of the defendants in development of this illegal combination, and in furtherance of its illegal purpose, of which we have already given a summary.

The first of these has relation to the so-called 65 per cent contracts. Much testimony has been taken on both sides in explanation of these contracts, which must be examined, in order to determine their character. It appears that, long prior to 1890, it had become a custom more or less prevalent in the anthracite region, for the smaller operators of collieries to sell the product of their mines to the large coal companies producing and shipping coal in their neighborhood, f. o. b. on the railroad to which their mines and territory were contiguous and naturally tributary. The terms on which these sales were made gradually came to be common to all parties so engaged; that is to say, instead of a fixed money price per ton, it was agreed that the small producer or independent operator who delivered his coal f. o. b. on the cars, should receive a certain per cent of the average price at which that grade of coal was sold during the month in the tide-water market of New York Harbor. Out of the balance over such percentage must come the freight of the carrying company, and whatever profit there might be for the purchasing coal company. The advantages of such sales to the independent and smaller operators were stated by

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many witnesses of that class. To have marketed their own coal would have required sales agents and the maintenance of officers at the various market points, and would have entailed the cost of insurance and the risk of collections, and not infrequently the cost of storage, upon the seller. All this was avoided by the contracts in question, and the seller, upon delivery of the coal upon the cars, was done with it and received each month from a responsible buyer the price of his coal, as determined by the contract. There is no doubt from the evidence that this method of dealing between the large companies and the smaller operators grew in favor with both parties to the contracts. The large purchasing companies being compelled to maintain sales agents and offices at the market points and provide for insurance or storage, if needed, were put to little additional expense in caring for and disposing of the coal thus purchased. There is no evidence to show that this custom had its origin and subsequent growth in any agreement or concerted scheme on the part of the defendant carriers or coal companies, or others in the business.

The testimony of the operators called by the government, and occupying a large space in the record, shows that this custom had commenced back as far as 1860, one of them saying that they were educated to it from the first, by reason of the difficulty of getting cars [450] and transportation just when they wanted it, to meet sales, but they all say that the principal reasons were those above enumerated—the expense of maintaining selling agencies and offices, risk of handling, and expense of storage, as contrasted with the regularity and certainty of payment secured by the method of selling f. o. b. to the large companies.

The rate of these percentage contracts was at first as low as 40 or 45 per cent. This percentage rose gradually to 55 per cent. About 1890, and for some time prior thereto, there had been some dissatisfaction expressed by the selling operators with the returns coming to them under these contracts. This dissatisfaction culminated in 1892, in an arrangement by which certain of the coal companies in the Wyoming region offered to take the product of the mines of the independent operators contiguous and tributary to certain of the rail-



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roads, on a 60 per cent basis. This seems to have been the result largely of negotiations had with Simpson & Watkins, large colliery owners of that region. (See testimony of Clarence D. Simpson, Record, vol. 2, p. 440 et seq.) Simpson had insisted on 65 per cent, but 60 per cent was finally agreed upon. This percentage seems to have been adopted by all the other coal companies and coal roads; whether by any concert or agreement among them, does not appear. This rate generally obtained until about 1899, when demands were made by some of the independent operators, whose contracts had expired or were about to do so, for an increase in the percentage prices to 65 per cent. Negotiations between the representatives of the independent operators and the coal companies and railroads were carried on for some time, without result, when early in the fall of 1900, a general strike of the coal miners and laborers of the whole anthracite region took place, resulting in an entire cessation of the production of anthracite coal.

There is some conflict in the testimony and in the contentions of counsel, as to the influences which brought about, on the part of the large coal companies and coal carrying roads, an acquiescence in this demand for 65 per cent contracts. We think, however, it is established by the clear preponderance of the testimony that, during the autumn of 1900, those controlling the large coal companies and railroads affected by the strike, were induced to concede to the striking miners a 10 per cent increase in their wages; that though this was agreed to on the part of the representatives of these companies, the smaller and independent operators were unwilling to accede to this increase, on the ground that it would necessitate the production of coal by them at a loss. As the strike extended over the whole anthracite region, and affected all producers of coal alike, the representatives of the striking miners refused to accept the settlement on the basis of this increase, unless agreed to by practically all the producers and operators throughout the region.

The proposed settlement having been thus brought to a standstill, conferences took place between representatives of the large coal producing companies and these dissentient operators—notably with those who had been parties to the

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expired 60 per cent contracts, with the result that it was agreed that new contracts should be framed and [451] entered into, by which 65 per cent of tide water prices should be given by the purchasing companies, instead of the 60 per cent of the price obtained at tide water under the former contracts, in consideration of the entire output of the mines of the contracting operators, without limitation as to time, "shipments to be made from time to time as called for by the buyer." On these terms, such operators were to join in the settlement of the strike on the basis of a 10 per cent increase in wages. Pursuant to this agreement, a form of contract, embodying its terms, was drawn up, which was presumably acceptable to all parties. At all events, contracts substantially in this form were thereafter, from time to time, executed severally between the theretofore purchasing coal companies and many of such so-called independent miners as produced their coal in territory contiguous and tributary to the roads over which the purchasing companies shipped their coal. These contracts provided that:

"The general average f. o. b. prices herein referred to shall be determined by a disinterested expert accountant, satisfactory to both parties, to whom the buyer shall furnish, not later than the 8th of each month, a statement of the quantity of each size sold during the preceding month, and the amount realized therefor by the buyer at tide on all sales of each size of coal from the \* \* \* region, and the accountant each month shall make a true average price for each size sold at tide of all the coal sold from the same region, and the average prices thus obtained shall be furnished by the accountant to the buyer and seller."

The expert accountant selected to make these returns was, naturally, Mr. Ruley, of the Statistical Bureau, who had since 1890 been furnishing these same statistics to the coal producing companies and all others interested.

Counsel for the government argue from the fact that these accounts were so rendered to the parties interested, that there must have been some concert or agreement in violation of the act of Congress among the defendants and others, with reference thereto. We cannot so regard it. It is, of course, possible that the information obtained from these monthly reports of the Statistical Agency or Bureau maintained by

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Mr. Ruley and his predecessor, might have been of some use to such a combination as is charged in the bill, to maintain rates of freight or prices of coal in the anthracite region, but, in the absence of any direct proof of such a combination, it is a very violent presumption, indeed, that, because of the existence of such statistics and monthly reports, published in all the trade journals of the country and in the hands of every retailer of coal, as well as in those of every producer of coal, there must have been such an illegal combination; and this too, in face of the fact that many obviously legitimate and useful purposes were to be subserved by such publications, to which all intelligent persons interested in the conduct of the business of producing, selling, carrying and consuming coal would, for their own information and advantage, refer. There does not seem to be the slightest direct proof, apart from the presumption we are asked to indulge in, of any illegal combination or contract promoted by the use of these statistics. The reports were public, and there is not the slightest intimation of any secret correspondence between the Statistical Bureau and the defendants. This information, [452] open to every one, was doubtless useful in many legitimate ways to those who subscribed for and supported it. We might as well be asked to draw unfavorable inferences, in the absence of other proof, from the use by the defendants of the statistics published by the state or federal governments, concerning mining operations and the coal supply of the country.

The genesis of these contracts being found in the long-established custom above described, the general raising of the percentage of price at tide water to be given to the individual seller, incident to the settlement of the strike, and the insistence by the so-called independent operators, whose previous contracts had expired, is not to be considered as necessarily predicated on any concert or agreement denounced by the act. Moreover, these contracts were clearly intrastate and not interstate in their character. They were complete when the coal was delivered at the mines f. o. b. to the buyer. They did not control or affect, except indirectly and incidentally, interstate commerce; much less did they suppress or restrain such commerce. No stipulation of the

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contract directly or indirectly touched the movement or disposition of the coal by the buyer after its delivery under the contract to purchase. Such buyer might have withheld all the coal thus purchased from the stream of interstate commerce, disposed of it in the state where it was bought, or in any other way exercised to the fullest extent every right appertaining to complete ownership of personal property. The law of July 2, 1890, can not be so construed, or such a purpose be imputed to those who enacted it, as to strike with nullity the legal intrastate contracts which do not in purpose or effect directly relate to or touch "commerce with foreign nations or among the several states." No judgment of the Supreme Court sanctions such an interpretation. On the contrary, that court has always adhered to the doctrine that the manufacture and sale of commodities within a state are not within federal control under the commerce law, merely because such commodities may, as well as may not, after their manufacture or sale, become the subject of interstate commerce. These contracts were not for the sale of coal to be delivered in another state. They did not reach beyond the delivery of coal f. o. b. the cars at the breakers. If such coal afterwards entered the stream of interstate commerce, it was because the buyer chose that it should do so, and it was then within federal jurisdiction under the commerce clause of the Constitution. But the contracts by which the title to such coal was acquired, not relating to or affecting, except incidentally and indirectly, interstate commerce, are not amenable to federal control.

It is said, however, that these contracts were made pursuant to concert or agreement entered into among the purchasing coal companies. It might be a question whether such contracts, even if the result of concert and combination, were in restraint of trade. But the evidence does not satisfactorily establish the existence of such combination or concert. The contracts were made, not by all with all, or by all with one, but by the coal companies severally with individual operators. In all essential features, these contracts took the place of the expiring contracts, whose history and genesis we have summarized. They were the result of the natural development of the business and the peculiar [453] condi-

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tions pertaining thereto in the coal region during a long series of years, and so far from being in restraint of commerce, contributed largely to its orderly and healthy growth. That the price given was determined by the price obtained for similar coal at tide-water in New York Harbor, did not impress an interstate character upon the contracts in question. It was merely the fixing of the standard by which the prices should be measured, and in no wise differed from the fixing of the price of such coal by the price obtained in San Francisco or Boston. In fact, the evidence is, that a large part of the coal so purchased was not taken to tide water at all, but was, to a considerable extent, disposed of in the state of Pennsylvania.

Nor does the mere fact that, during the long period when these contracts were in vogue, there was equality in the percentage offered and paid by the buyers to the sellers, or practical equality in the prices obtained by different defendants as sellers at tide-water, argue any concert or combination denounced by the act of Congress. Equality in prices for staple articles given and received, is the general result of free competition among buyers and sellers. Of this, the grain markets and cotton markets of the world furnish signal examples. Nor can we attribute to the so-called 65 per cent contracts an inherent illegality under the law, in the fact that they provide for the purchase by the coal companies of the whole product of the mine, whereas the percentage contracts prior to 1900 or 1902 were to continue only for a term of years. To buy the whole product of a mine is just as legitimate a transaction as to buy a portion of it. To buy the whole produce is just as legitimate as to buy the mine itself. And it is difficult to see how the 65 per cent contracts directly affect interstate commerce, if, as seems clear to us, those to which they succeeded did not. A form of contract used for purchase and sale under these contracts has been shown. Uniformity in the framework of these contracts would seem to be the natural result of the situation, each seller demanding the terms that obtained among other sellers, and is no more evidence of concert or agreement, illegal or otherwise, than the uniform character of negotiable notes and bills of lading, as used in the business world. There is no evidence to show

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that the coal bought by the coal companies under these 65 per cent contracts was not sold by them in competition with each other, just as it is proved all other coal owned or produced by them was sold, whether at tide-water in New York City, or elsewhere.

Being clearly of the opinion that these so-called 65 per cent contracts are not within the mischief denounced by the act of July 2, 1890, and have no proved connection with any general combination or conspiracy, as charged in the seventh paragraph of the bill, I think as to them the bill should be dismissed.

Nor can we agree that the abortive or abandoned attempts by the defendants, or some of them, to come to agreements or arrangements in 1876, 1884, and 1886, even if admitted to be of a character now denounced by the act of July 2, 1890, have any evidential bearing, remote or otherwise, upon the charge now being considered by the court. In the first place, the several acts referred to were legal when made. They certainly violated no act of Congress then in force; and in the [454] second place, were abandoned long before the passage of the act now under consideration.

If no general agreement or conspiracy in violation of the act has thus far been disclosed by the testimony, direct or indirect, it is hardly worth while to consider in this connection at any length, the separate acts of individual defendants or groups of defendants, so far as they are alleged to have been committed as steps in the development of the general illegal combination charged in the petition, and in furtherance of its illegal purposes. Nor do these separate acts constitute circumstances from which the existence of such general unlawful combination and agreement can be inferred. The alleged absorption by the Erie Railroad Company, in January, 1898, of the New York, Susquehanna & Western Railroad Company, even if it were held violative of the provisions of the act of July 2, 1890, on the part of the two companies concerned, has no relation whatever, necessary or otherwise, to any general conspiracy, such as is charged against all the defendants. The same observation is true, also, of the transaction in which the Reading Company ac-

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quired a majority of the shares of the capital stock of the Central Railroad Company of New Jersey, thereby, as alleged, uniting and bringing together under a common head and source of control, that company and the Philadelphia & Reading Railway Company. In fact, if all be true, as is alleged of these two transactions, they enabled these two groups of defendants to compete more efficiently with some of the other defendants. They certainly do not tend to prove the conspiracy which must be assumed, if they are to be considered as steps in the development or furtherance thereof.

A careful consideration of the very able argument and brief of the counsel for the government, does not convince us that the evidence discloses any such general contract, combination or conspiracy among the defendants in restraint of trade or commerce among the several states, or to monopolize any part of the trade or commerce among the same, as charged in the petition. Certainly there is no direct evidence of such a combination or conspiracy, and we think it is equally obvious, from what we have just said, that there is no indirect or convincing circumstantial evidence of the existence of such a conspiracy. The things herein charged are violations of law, and constitute the crimes denounced by the act. We refrain from saying that, on that account, the degree of proof of their commission should be that required upon the trial of indictments therefor. It suffices to say that the evidence should be such as to convince the mind of the tribunal to which it is addressed, that the acts denounced by the law have been committed. The consequences attending the finding of the defendants guilty of the acts charged in the petition in this proceeding, are certainly very serious, not only to the defendants, but to a large portion of the public and to many innocent persons involved in these transactions. As we have before said, this consideration can only be pertinent to invoke a more careful consideration of the testimony adduced in support of the charges made in the petition.

We are not unmindful that the conspiracies and combinations forbidden by the act may be proved otherwise than by direct and positive testimony of definitively formed agree-

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ments, and that it is a part of the [455] law of conspiracy, that "if there is a meeting of minds brought about in any way to accomplish the common purpose, the essentials of a guilty combination are all satisfied." We fail, however, to find in any of the acts and transactions disclosed by the testimony, evidence of any general combination or purpose to combine in violation of the provisions of the act continuing after the date of its enactment. Except as hereinafter stated, we cannot find, from any fair intendment of the act in question, a purpose to denounce general conditions and relations such as now exist among the parties engaged in the mining, selling and transportation of anthracite coal, whether intrastate or interstate in its character, disclosed by the evidence, as now existing since July 2, 1890, and we can impute no intention to the framers of the act to disturb such conditions.

To violate the act, there must be a contract, combination or conspiracy, which in purpose or effect tends to restrain trade or commerce among the states, or to monopolize some portion thereof. Whether in purpose or effect violative of the act, such contract, combination or conspiracy must have the ordinary meaning attached to those words. There must be the meeting of the minds of two or more, to accomplish some common purpose directly violative of the act, or a purpose which will, whether intentional or not, in effect constitute a restraint of trade and commerce among the several states. In most of the cases under this act which have come before the Supreme Court, the existence of the contract, combination or conspiracy, has been either admitted or clearly and definitely proved, and the question of difficulty presented to the court was, whether the contract, admitted or proved, came within the purview of the act. In this case, however, we are met at the threshold with the denial of the existence of any such contract, combination or conspiracy, generally charged against all the defendants, and with what we think is a deficiency in the evidence adduced to support the same.

In the *Addyston Pipe case*, 175 U. S. at page 285, 20 Sup. Ct., at page 105 (44 L. Ed. 136), the court say:

"We are thus brought to the question, whether the contract or combination proved in this case is one which is either a direct restraint



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or a regulation of commerce among the several states or with foreign nations, contrary to the act of Congress."

Immediately thereafter, the court adopt the statement of special facts made by the learned circuit judge, in part, as follows:

"The defendants, being manufacturers and vendors of cast iron pipe, entered into a combination to raise the prices for pipe for all states west and south of New York, Pennsylvania and Virginia, constituting considerably more than three-quarters of the territory of the United States and significantly called by the associates 'pay' territory."

In the *Northern Securities case*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, of course the existence of the contract or combination, the result of which was the incorporation of the Northern Securities Company, for holding the stock of and controlling and managing two competing railroads, was not denied. Its terms and conditions and purpose were before the court, and were not the subjects of dispute or [456] controversy. The question argued before the court, and upon which the court divided, was whether this combination, admittedly existing, was within the purview of the act of Congress.

In *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, the case came up upon demurrer by the defendants to the petition, and the Supreme Court decided in effect, that the allegation as to the existence of a contract, combination or conspiracy, was sufficient.

In *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, the combination to "boycott" the interstate trade of a certain hat manufacturer in Connecticut, was admitted or clearly proved.

So far, we have considered the denunciation of agreements or combinations in restraint of trade as set forth in the first section, and combinations to monopolize any part of interstate trade, together, because both involve the agreement and combination of two or more persons to accomplish a common purpose, as above discussed.

Section 2, however, makes it an offense for any person to monopolize, or attempt to monopolize, any part of interstate trade or commerce. The monopoly feature of the act

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is covered by the charge of combination and conspiracy to monopolize, and the individual offense can only exist as to individual defendants. There must, however, be a clear, legal concept of the words "monopolize" and "monopoly," in order to properly consider the charge in this respect, as set forth in the petition. The word is hard to define, and no attempt at exhaustive definition need be made. It will suffice to say that the mere extent of acquisition of business or property achieved by fair or lawful means cannot be the criterion of monopoly. In addition to acquisition and acquirement, there must be an intent by unlawful means to exclude others from the same traffic or business, or from acquiring by the same means property and material things. As said by Judge Sanborn in *U. S. v. Standard Oil Co.*, 173 Fed. 177:

"It (the Anti-Trust Act) was enacted, not to stifle, but to foster competition, and its true construction is that, while unlawful means to monopolize and to continue an unlawful monopoly of interstate and international commerce are misdemeanors and enjoined under it, monopolies of part of interstate and international commerce, by legitimate competition, however successful, are not denounced by the law, and may not be forbidden by the courts."

But, even if the proper interpretation of the word "monopoly" were as broad as contended for, as we have already said, we find no evidence to support the charge of an agreement, combination or conspiracy on the part of the defendants in that regard.

The Supreme Court has said that it was not the intention of the court to obstruct, trammel or interfere with the freedom of business, or with the necessary or lawful relations of those engaged in it. The situation in the anthracite region is a somewhat unique one. The territory in which the anthracite coal deposits are found is comparatively a restricted one, and the development of the business of producing, preparing for the market and transporting it, though necessarily affected by the peculiar conditions surrounding it, has had, on the whole, a natural, wholesome and beneficial growth. It cannot be that every phase in this development, which tends to the better regulation of a business engaged in by many operators, corporate and individual, [457] which

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incidentally but not directly affects the selling and transportation of coal in and to other states, in the absence of the unlawful purpose denounced in the act, can be visited with the serious consequences sought in this case to be visited upon the defendants. We have already commented on the fact that the development of this business has tended to eliminate from it the confusion, loss, and wasteful conditions which characterized the earlier period of its growth, in accordance with the natural laws which govern competition and reward intelligence and enterprise.

It has been said in many cases, and the brief of the United States admits, that mere acquisition of the material sources of wealth, and the enlargement of business and traffic, accomplished without the illegal combination or conspiracy denounced by the act is not unlawful. In the present case, it has resulted in a large percentage of the coal lands of the region being held by wealthy and powerful corporations who have the ability, and whose interest it is, to conserve those natural resources so valuable to the people of the whole country. The evidence of this case tends to show that these large holding and carrying companies do carry on their business in competition with each other; and there is nothing to show that there has been any general agreement or combination between them, verbal or in writing, in restraint of trade and commerce among the states, by a suppression of competition or otherwise, as is charged in the first clause of the seventh paragraph of the petition.

Counsel for the government insist that the cases in which the Supreme Court has discriminated between those acts of the state Legislatures which unlawfully invade the exclusive domain of federal regulation of interstate commerce, and those which do not, are applicable to the consideration of the present case. I think this is so only in a qualified sense. But, pursuing the argument on this line, we find that the Supreme Court has said repeatedly, that state legislation enacted without intent to regulate interstate commerce, is only unlawful if it directly and substantially interferes therewith, but not so if it affects interstate commerce only incidentally and not substantially. I find nothing in

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this case, either in the evidence in support of the general charge of conspiracy, or of the individual acts of the Reading Company, with reference to the stock of the Central Railroad Company of New Jersey, or of the Erie Company, with reference to the stock of the New York, Susquehanna & Western Railroad Company, by which there has been made manifest any purpose to restrain interstate commerce, or anything to show that the effect of these transactions has been to directly interfere therewith.

As to the Temple Iron Company transaction, in which seven of the defendants are involved, to wit, the Reading Company, the Central Railroad Company of New Jersey, Lehigh Valley Railroad Company, the Delaware, Lackawanna & Western Railroad Company, Erie Railroad Company, and the New York, Susquehanna & Western Railroad Company, it is charged, and the charge is supported by the proof, that the defendants named entered into a combination or conspiracy to defeat and prevent the building of a railroad and the construction of [458] an interstate route for the carrying of coal from the Wyoming region to tide water. The details of this transaction are fully set out in the opinions written by the other members of the court, and need not be here repeated. I agree with the conclusion reached in one of these opinions, that this so-called Temple Iron Company transaction involved a combination or conspiracy by the defendants above named, in violation of the act of July 2, 1890, as being in restraint of commerce among the states. It seems to me clear that an agreement was come to by the defendants named, which resulted in concerted action for the avowed purpose of bringing about an abandonment of the project of a route from the Wyoming coal field in the state of Pennsylvania, for the carriage of coal, to tide water in the state of New York. This avowed and conceded purpose rendered all that was done in pursuance thereof violative of the act of Congress in question, however innocent and legitimate it might have otherwise been. It is true, that the Simpson & Watkins collieries might have been innocently purchased by the defendants, separately or in combination, but as they were purchased in order to carry

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into effect the purpose of an unlawful combination, it seems to me the transaction was clearly within the denunciation of the law. The Temple Iron Company was the palpable instrument or means by which the unlawful purpose of the combination was accomplished, and its acquirement of the said collieries, in pursuance of that combination, must be held as illegal. I cannot think that the fact that the Pennsylvania charter of the proposed railroad—The New York, Wyoming & Western by name—only authorized its construction from a point in the Delaware river, in Northumberland county, Pennsylvania (being also the boundary line between the states of New Jersey and Pennsylvania), opposite or near Belvidere, New Jersey, and thence to a point in the Susquehanna river, within or near Pittston, Luzerne county, Pennsylvania, with the necessary branches or laterals, affects in any way the character of the combination charged as being illegal. It clearly appears from the evidence that a project for a railroad route from the coal fields in Pennsylvania to tide water in New York, was being discussed and ostensibly promoted by named parties interested in the coal regions, notably the firm of Simpson & Watkins, and that the charter above referred to had been obtained as a step towards the consummation of the purpose to construct such a route. I do not think we are called upon to consider and weigh the evidence, pro and con, as to whether the projectors of this route would or would not have been able to carry the same to completion. It matters not for present purposes whether the enterprise would have resulted, or not, in failure. The important fact is, that the defendants named, interested in the production and carriage of coal from Pennsylvania to tide water in New York, believed that the project of constructing such a route was a serious one, and that it induced them to combine, in order to thwart that purpose. The combination brought about the abandonment of the project, and the possibility of a competing road in interstate commerce was, for the time being, frustrated. I cannot escape the conclusion, therefore, that the decree of this court should denounce as illegal the combination by which this result was brought about, if a decree for an injunction, un-

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[459]der the prayers contained in the petition can be founded upon such denouncement.

The injunction or restraining order specifically prayed for in the petition should be granted, so far as it will serve "to prevent and restrain" the future or continuing violation of the act. This is the only jurisdiction conferred upon the court in such a proceeding as the one before us, and there can be no injunctive relief granted, unless it tends to restrain some specific future or continuing violation of the act.

BUFFINGTON, Circuit Judge (concurring and dissenting).

I concur in the court holding the Temple Iron Company an illegal combination.

I dissent from its action in dismissing the bill as to the 65 per cent contracts.

I restrict my opinion to discussing those two subjects.

I concur in the court's dismissal of the bill as to the other matters.

This petition, in the nature of a bill in equity, filed by the United States against certain railroads hereinafter named, and a number of other respondents, charges violations of section 1 of the act of July 2, 1890, entitled, "An act to protect trade and commerce against unlawful restraints and monopolies," which provides that:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

And section 2, which provides that:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor," etc.

The petition is filed in pursuance of section 4, which enacts that:

"It shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations."

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The case is on final hearing, and its determination involves two questions, viz.: First, the meaning of the law; and, second, whether the facts proven fall within its prohibitions.

In taking up the first question, it is well to note that, the validity of the law being conceded, the court's duty is simply to declare its meaning and enforce its provisions, for whether the law itself is in the line of sound commercial policy and industrial progress is a legislative, not a judicial, question. It suffices to say Congress has passed it; the executive, in pursuance of its terms, seeks to enforce it; it remains for the court not to question the wisdom of the Legislature in enacting, or the executive in enforcing, but simply to declare its meaning and give effect to its provisions.

The first section uses broad, inclusive words. The object of the law is to prevent "restraint of trade or commerce among the several states"; and this is accomplished by making illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states." The [460] words "contract," "combination," "conspiracy," are clear, and "trade among the several states" is equally so. The coupling phrase "in restraint" would seem to be the only term open to question.

"Restraint" is a comprehensive word and covers the several individual kinds thereof described in—check; hinder; repress; curb; restrict. By the use of this broad phrase, "in restraint of trade or commerce," it would seem that one of the objects Congress had in view was the maintenance of that natural, free flow of commerce incident to its commercial, competitive character. We are therefore justified in holding that, although the word "competition" is not used therein, this act, as said in *Chesapeake & Ohio Fuel Co. v. United States*, 115 Fed. 610, 620, 53 C. C. A. 256, 266 (a case in which two of the present justices of the Supreme Court sat), was "aimed to maintain interstate commerce on the basis of free competition." Such being the case, and the Supreme Court has likewise held, we have an aid both to its construction and enforcement, namely, the object for which the law was enacted.

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Turning now to the decisions of the Supreme Court, it was decided in the *Northern Securities case*, 193 U. S. 337, 24 Sup. Ct. 457 (48 L. Ed. 679) that:

"The means employed in respect to the combinations forbidden by the anti-trust act, and which Congress deemed germane to the end to be accomplished, was to prescribe as a rule for interstate and international commerce, (not for domestic commerce), that it should not be vexed by combinations, conspiracies or monopolies which restrain commerce by destroying or restricting competition. We say that Congress has prescribed such a rule, because in all the prior cases in this court the Anti-Trust Act has been construed as forbidding any combination which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce; in other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce. Now, can this court say that such a rule is prohibited by the Constitution or is not one that Congress could appropriately prescribe when exerting its power under the commerce clause of the Constitution? Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. Undoubtedly there are those who think that the general business interests and prosperity of the country will be best promoted if the rule of competition is not applied. But there are others who believe that such a rule is more necessary in these days of enormous wealth than it ever was in any former period of our history. Be all this at it may, Congress has, in effect, recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce. As in the judgment of Congress the public convenience and the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that must be, for all, the end of the matter, if this is to remain a government of laws, and not of men."

As further emphasizing free competition as the object of the statute, the court stated its preceding decisions established the proposition "that Congress \* \* \* has prescribed the rule of free competition among those engaged in such commerce," and:

"We need only say that Congress has authority to declare, and by the language of its act, as interpreted in prior cases, has in effect declared, that the freedom of interstate and international commerce shall not be obstructed or disturbed by any combination, conspiracy, or monopoly that will restrain [461] such commerce, by preventing



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the free operation of competition among interstate carriers engaged in the transportation of passengers and freight."

Since, then, the object of the act is to conserve free competition in interstate commerce, we are justified in holding that the phrase, "in restraint of trade or commerce among the several states," forbids everything that restricts free competition in interstate commerce. This brings us to inquire whether any combination of that nature exists in this case.

The anthracite coal supply of the United States is practically limited to a small area of less than 500 square miles in northeastern Pennsylvania. Its consumption is general in other states; practically four-fifths of the entire output entering into interstate commerce in 1905. Six interstate railroads, hereinafter called the defendant carriers, to wit, Reading Company (owning the Philadelphia & Reading Railway Company); the Lehigh Valley Railroad Company; the Delaware, Lackawanna & Western Railroad Company; the Central Railroad of New Jersey; the Erie Railroad Company; and the New York, Susquehanna & Western Railroad Company—haul about 80 per cent of the output and control all means of transportation from the anthracite field to New York Harbor, the principal market for anthracite coal, save relatively small territorial facilities of the Pennsylvania Railroad Company and the New York, Ontario & Western Railroad Company. These six defendant railroads are not only competitors with each other by virtue of the natural conditions incident to all common carriers, but being themselves, through their several subsidiary coal companies, hereinafter called defendant coal companies, buyers of coal from operators, producers of coal themselves, and likewise sellers of such bought and produced coal, they are in keen competition with each other not only in transporting, but in buying coal to originate freights and in selling it to realize profits. It will be observed that since 1895 the defendant railroads have through their subsidiary coal companies increased their coal holdings by 30,000 acres and from producing, in 1900, 68 per cent of the total output, they produced 78 per cent in 1907. The substantial identity of the several defendant railroads and their respective subsidiary

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coal companies is shown in the proofs. Take, for example, the Lehigh Valley Railroad Company and the Lehigh Valley Coal Company. The coal company's stock is all owned by the railroad company. No dividend has ever been paid upon it. The funds to operate it are advanced by the railroad company. Its present indebtedness to the latter is about \$11,000,000. On this no interest is paid. Both companies have the same officers, and in its annual report the railroad company says:

"Under existing arrangements the Lehigh Valley Coal Company is compelled to depend upon the Railroad Company for working capital to carry on its operations."

In other words, the coal company is the subsidiary, corporate hand of the railroad company, and, while its corporate entity is separate, yet in work, profit, interest, and official personnel, it is but an alter ego of the railroad company itself. And such is the view taken of this relation by the courts. In *Interstate Commerce Commission v. [462] Baird*, 194 U. S. 42, 24 Sup. Ct. 568 (48 L. Ed. 860), the Supreme Court say:

"Here is a railroad company engaged at once in the purchase of coal through a company which it practically owns."

The anthracite field is divided into three regions, called the Lehigh, the Schuylkill, and the Wyoming or Lackawanna. In 1907, some 67,000,000 tons of anthracite were mined in these regions, of which over 17,000,000 were carried to New York Harbor. From 70 to 75 per cent was produced by the defendant railroads through their coal companies, and the balance by individual operators. Their respective coal tonnages in that year were:

|  |       |              |
|--|-------|--------------|
| Philadelphia & Reading Railway Co.....       | 20.89 |              |
| Central Railroad of New Jersey.....          | 12.99 |              |
| Lehigh Valley Railroad Company.....          | 17.18 |              |
| Delaware, Lackawanna & Western R. R. Co..... | 15.25 |              |
| Erle Railroad Company.....                   | 10.66 |              |
|  |       | <hr/> 76.97  |
| Delaware & Hudson Company.....               | 9.78  |              |
| Pennsylvania Railroad Company.....           | 9.24  |              |
| New York, Ontario & Western.....             | 4.01  |              |
|  |       | <hr/> 23.03  |
|  |       | <hr/> 100.00 |

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Referring, for convenience, to the summary for relief at the conclusion of the government's brief, we may say that the first, second, and fifth grounds of relief refer to general acts in which all the defendant railroads are alleged to have joined, while the third, fourth, sixth, seventh, and eighth concern acts in which some but not all of the defendant railroads participated. Objection to the joinder of such rights of action was first urged upon the court at final hearing. Without entering upon a discussion of the authorities bearing on multifariousness, we content ourselves with saying the omission of the respondents to urge this ground until the final hearing was a waiver thereof, and while a court on such hearing may, of its own motion, dismiss a bill, it will not do so if that objection does not embarrass or prevent it decreeing relief. Without, therefore, holding this bill free from objection in that regard, we are of opinion, in view of all the circumstances attending the conduct of the case, that it should not be dismissed on that ground, and we accordingly address ourselves to the merits, and in doing so we confine ourselves to the Temple Iron Company transaction and the 65 per cent contracts, taking up first the combination of these six defendant railroads through the Temple Iron Company, for in our opinion that transaction involves the broad, underlying right of these railroads to combine in matters of interstate commerce and, in connection with the perpetual 65 per cent contracts, is the real gist of the controversy.

The specific relief asked for in the government's brief in that regard is:

"Fifth. That the Temple Iron Company is a combination of the defendants, Reading Company, the Central Railroad of New Jersey, Lehigh Valley Railroad Company, the Delaware, Lackawanna & Western Railroad Company, Erie Railroad Company, and the New York, Susquehanna & Western Rail[468]road Company, in restraint of trade and commerce in anthracite, in violation of the said act, and every such defendant, and any subsidiary company or agent of either is enjoined from voting the stock of the Temple Iron Company, from receiving any dividends or other profits arising therefrom, and from exercising any control over the same."

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This is based on sub-division "d" of paragraph 7, and is a condensed form of the fifth prayer of the bill, which, *inter alia*, is that the Simpson & Watkins collieries were acquired by the defendant railroads in pursuance generally of the combination charged in paragraph 7, "and specifically in pursuance of a combination or conspiracy between the defendants last named to defeat the construction of a competing railroad from the anthracite fields to tidewater, in violation of the aforesaid act of July 2, 1890."

A brief preliminary account of anthracite mining and marketing methods is helpful to an understanding of the case. We have seen that the sole means of transporting anthracite to market is by rail; that the defendant railroads, through the agency of their subsidiary coal companies, are themselves interested in mining coal, and in purchasing the coal produced by other mining companies and individuals, and in the sale of the same. The coal sold by the outside producer to the subsidiary coal companies is paid for on a percentage of the price coal commands at New York Harbor. Originally the coal producers' percentage of this was 40 per cent, but from time to time it has been increased to 65 per cent. The remaining 35 per cent is the defendant railroads' share, which covers freight, selling expenses, and profit. The adjustment of these percentages has been a constant ground of contention between producers and railroads. An increase thereof has been urged by the former because of the greater cost of mining due to exhaustion, which compels a resort to deeper levels, and added expenses caused by pumping water therefrom; raising of miners' wages; shorter hours of labor; expense incident to safety laws, prevention of fires, and explosions; and finally to the high grade of coal preparation demanded by the public. It is, of course, also contended by the producers that the percentage retained by the defendant railroads gave them an undue freight rate. Without entering into a discussion of the merits of these contentions, it is to be noted that the difficulty that confronts both railroads and producers in the proper adjustment of their relative rights, and wholly without fault on the part of either, is complicated by the public market demand that

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the coal be prepared for use in such form as will meet the somewhat exacting demands of the purchasing public. In buying coal the public does not base its requirements so much on the real worth in heat units of the coal as on size and appearance. For example, the first breakage of coal which results in grate size is necessary. But the public demands a second breakage into smaller sizes, which is very expensive. Thus Mr. Sturges, a government witness, says:

"The expense of mining and preparing coal is very greatly added to by two requirements in our contract; the one compelling the breaking of our coal twice. There is a terrible loss on each breakage. The first breakage is necessary. \* \* \* You cannot take those immense chunks of coal that come out of the mine and sell them in that way. That breakage reduces them to grate. If they could remain of the sizes made by the first breaking, [464] I think that coal could be sold at a profit 10 per cent cheaper than it is to-day. The public will not take it, though; it has to be broken again. The dust, so far, is unsalable, although it is the purest of carbon."

Just what this requirement practically amounts to in dollars and cents Mr. Fuller shows:

"I could give you an approximate idea as to the less price received for coal by breaking it down. \* \* \* One test we made was by taking 200 tons of grate coal, large coal, and breaking that down. The reason was that the market had got to a condition where it would not take grate coal. Figuring that coal on a basis of the price which was quoted at that time on that size, say \$2 a ton, and breaking that coal down, which gave us the smaller sizes and culm, there was a loss of about \$71 on the 200 tons."

The operators who sold their coal at the breakers to the subsidiary coal companies received, as we have paid, for some years 50 per cent and then 60 per cent of tide-water price. This left the carriers 50 per cent and then 40 per cent for freight and selling expense. The operators claimed the carrier received an undue share for freight, etc., and contended for a 65 per cent rate.

The proofs show that in the early part of 1899 from 8,000,000 to 9,000,000 of operator's tonnage, which had been tied up on seven-year contracts with the subsidiary companies at 60 per cent, would expire. With a view to availing themselves of this fact, a number of operators in 1898 organized the New York, Wyoming & Western Railroad Company, which

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was empowered to build a line from the Susquehanna river near Pittston, the heart of the Wyoming region, to a point on the Delaware river opposite Belvidere, N. J. Its capital was subscribed for by independent operators, who pledged to it some 500,000 tons of output. Among its supporters was the partnership of Simpson & Watkins, which owned the controlling shares of eight collieries in the Wyoming region with a production of 1,300,000 tons, of which 500,000 tons were released by contract expiration. Mr. Sturges, the president of the road, testified that it was projected, "the same as all other organizations and movements of the independent operators, in the hopes of bettering their conditions, securing lower rates and a better market for coal—in fact, better net results for their business." Apart from the projected road's competitive effect in depriving the defendant railroads of the tonnage it might take from some of them, its retention of 35 per cent instead of 40 per cent, to cover its freight, etc., for it proposed increasing the operators' price from 60 to 65 per cent would have an unsettling effect on the tariffs of the other railroads. Its tendency would seem to be to cause competition among, as well as with, the defendant railroads themselves. We have seen that the northern division was served by eight railroads, whose tributary territory might be affected by the entrance of this ninth railroad. Moreover, at its eastern end at the Delaware river, the new road might make three of these defendant railroads, namely, the Delaware, Lackawanna & Western Railroad Company, the Lehigh Valley, and the Central Railroad of New Jersey, as well as the Pennsylvania Railroad Company, competitors for its freight to tide. It is now contended this new road was a paper project and would never have been built, and that, even if built, its charter would only carry [465] it to the border of Pennsylvania. But it is evident not only from what the defendant railroads actually did to prevent its construction, but from what they themselves say, that it was a possibly strong competitive factor to tide-water, the elimination of which was necessary to preserve a non-competitive status among these defendant railroads, the lines of several of which might be used as a connecting line to tide water

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from the terminus of the projected road. Mr. Thomas, then president of the Erie and the New York, Susquehanna & Western, and now president of the Lehigh Valley, testified in that regard as follows:

"A. \* \* \* Simpson & Watkins, who were shippers on the line of the Erie and Lehigh Valley roads, as well as the Ontario & Western—

"Q. The Lackawanna also?—A. Yes, they were shippers on the Lackawanna. They were, as usual, dissatisfied with the rates, thought they should have lower ones. We declined to lower the rates; they were reasonable. They got a lot of tonnage together, their own and that of other shippers, and threatened to build another road to the Delaware river opposite Easton. \* \* \*

"Q. You understood at that time that the Simpson & Watkins' properties and those that were associated with them were seeking a market?—A. I did.

"Q. And that the tonnage that was then tributary to the Erie Railroad might get away from it to some other railroad?—A. There was every prospect that it would.

"Q. To either an existing railroad or some new railroad?—A. Yes.

"Q. And it was the possibility of the loss of that tonnage that induced you to go in, as an officer of the Erie Railroad, to the Temple Iron Company transaction?—A. It was.

"Q. And to protect the Erie Company?—A. Yes, sir.

"Q. As to the Lehigh Valley, what were the motives that caused the Lehigh Valley to go into it?—A. I do not know what their motives were, but I assume they were the same as mine. Part of the mines were on their lines, and I assume that they wanted to retain the tonnage they had. Somebody would have bought those properties, and it was better to buy them jointly and allow the tonnage to go to the roads that had formerly carried it, than otherwise."

These and other proofs that might be cited make it clear that the New York, Wyoming & Western Railroad Company threatened competition in the anthracite interstate trade in buying, carrying, and selling coal, and that which follows shows that such competition was defeated by a combination of the defendant railroads, which combination used the Temple Iron Company, a Pennsylvania corporation, as its instrument to preclude competition. This was done by the defendant railroads through such holding company buying the Simpson & Watkins' interests. The negotiations for such purchase were conducted by Mr. Simpson and by Mr. Bacon of the firm of Morgan & Co., Mr. Maxwell, then president of the Central Railroad of New Jersey, Mr. Thomas, then presi-

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dent of the Erie, and Mr. Twombly, then a director of the Philadelphia & Reading Railway Company and who was also financially interested in the Simpson & Watkins' interests; all being present. Mr. Simpson's testimony is:

"Q. When did you and Mr. Watkins sell out the interest in the collieries which you controlled to the Temple Iron Company?—A. 1898 or 1899; I am not certain; nine or ten years ago.

"Q. Were you actively engaged, you personally, in the negotiations which led up to that sale?—A. Yes, sir.

"Q. With whom did you negotiate?—A. Robert Bacon, Esq.

"Q.—Who is Robert Bacon, Esq.?—A. A member of the firm of J. P. Morgan & Co.

"Q. What did J. P. Morgan & Co. have to do with the Temple Iron Company?—A. Nothing that I know of.

"Q. What was Mr. Bacon's relationship to the Temple Iron Company?—A. I was asked what I would take for the collieries, and we met one [466] afternoon, and Mr. Robert Bacon was there. I did not know whom he represented. The Temple Iron Company charter was bought afterwards, and we paid for it.

"Q. You met Mr. Robert Bacon somewhere?—A. Yes.

"Q. Where was this?—A. In Mr. H. McK. Twombly's office.

"Q. Where was that office?—A. Mills Building here in New York City.

"Q. You met there Robert Bacon of the firm of J. P. Morgan & Co.?—A. Yes, sir.

"Q. And he inquired what you would take for your collieries?—A. Yes, sir.

"Q. Did you tell him?—A. Yes, sir.

"Q. Follow the negotiations along.—A. I told him.

"Q. Then what happened?—A. He thought it was too high, and we discussed it, and we said we would not take anything less. We said, 'We have 40,000,000 tons of coal in the ground, and we have a capacity of 7,500 tons a day. We can mine it for so much a ton and we will have so much money for it. We have got so much invested in improvements. If our figures about improvements are not right, we will take off half a million dollars.' He said: 'Would you be willing to submit to a technical examination?' We said: 'No, we will not. We will get up our figures and show them to you, and if you do not like it you need not take it. If we haven't got that much money invested, we will take off half a million dollars.' On that basis we showed our figures and they took it. The Temple Iron Company we did not know anything about.

"Q. When these negotiations were going on with Mr. Robert Bacon, you knew nothing about the Temple Iron Company?—A. No.

"Q. It was with Mr. Robert Bacon of this firm of bankers here in New York City that you had the negotiations, and it was to him you showed these figures?—A. Yes, sir.



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"Q. Did he accept the proposition?—A. I don't know that I showed him the figures, but I furnished the figures and somebody showed them to him. The deal was consummated.

"Q. Did Mr. Bacon accept your proposition?—A. Somebody gave us the money.

"Q. I want to know where you and Mr. Bacon came to an agreement, if such a thing happened?—A. Really I never saw him afterwards.

"Q. Whom did you see after that in connection with this matter?—A. Nobody, except we went to the Guaranty Trust Company and got our money.

"Q. You did not know who supplied it?—A. No.

"Q. Did the Guaranty Company pay you in cash?—A. Check, and I very gladly indorsed it. I am awfully sorry now I took it.

"Q. You do not know whom Mr. Bacon represented?—A. No.

"Q. You had not heard of the Temple Iron Company up to that time?—A. No, sir.

"Q. What was your first information about the Temple Iron Company?—A. I understood they had a charter that you could do almost anything under except commit murder, and they bought it for that purpose.

"Q. Who bought it?—A. This crowd that was to buy our collieries. I do not know who bought it.

"Q. Did you have anything to do with the purchase of the charter?—A. We paid for it.

"Q. Who is 'we'?—A. Simpson & Watkins and our other partners paid \$150,000 for the Temple Iron Company charter.

"Q. Simpson & Watkins bought the Temple Iron Company charter?—A. I mean the crowd. I am not saying Simpson & Watkins did it, but we thought it was a good charter, and we bought it and used it.

"Q. Who was it that wanted it?—A. I do not know.

"Q. For whom were you acting when you bought the charter of the Temple Iron Company?—A. That was part of the deal.

"Q. Understood between you and Mr. Bacon?—A. No, we thought we had a good charter and we would finance the company and turn in the stock, and we paid in a hundred and fifty-one thousand dollars for the charter and gave them four hundred and odd thousand dollars working capital and we took stock and bonds.

"Q. Who paid that hundred and fifty-one thousand dollars?—A. I suppose it was paid out of what might be called a syndicate.

"Q. You do not know who the other members of the syndicate were?—A. No.

"Q. Were you at any time president of the Temple Iron Company?—A. Never.

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"Q. Was Mr. Watkins?—A. Yes, sir.

"Q. When?—A. When it was formed and took over this property. He was president for one or two years.

"Q. What was the business of the Temple Iron Company prior to the time it was bought out by you gentlemen?—A. It owned a little pig iron furnace.

"Q. Down in Reading?—A. Near Reading.

"Q. What was the object in buying up that charter?—A. Because it had a broad charter.

"Q. The purpose was to get the use of that charter?—A. Yes.

"Q. Do you know what the capital stock of the Temple Iron Company was at that time?—A. At that time?

"Q. Yes, sir. \$240,000, do you remember?—A. I do not know.

"Q. You paid [467] \$151,000 for it.—A. Yes.

"Q. Was the stock then increased with your concurrence and active assistance?—A. Surely.

"Q. To what point?—A. I think \$6,000,000.

"Q. Did you take stock in it for your collieries, or were you paid cash for the collieries?—A. We took stock and cash and bonds."

Mr. Baer, president of the Reading, states he first heard of the purchase through Mr. Coster, a member of Morgan & Co., and his account is this:

"Mr. Coster, who was on the executive committee of the Reading Company, was exceedingly anxious that the Reading Company should join in the purchase of those properties. The purpose of it was to help the Erie; the situation was a financial one really. J. P. Morgan & Co. had reorganized the Erie Railroad. They had just a year or two before taken hold of the Lehigh Valley. I had been their counsel and made the mortgages for the Lehigh Valley and fixed up that loan, called the general mortgage or consolidated mortgage, I have forgotten which. The Reading had just been taken out of the hands of the receivers, and when these collieries were offered for sale in New York the Erie people became very much alarmed. They were afraid of losing that tonnage, and, although it seemed to be tied to them, they argued that they might lose the tonnage and the Lehigh Valley would lose the tonnage and that would seriously affect those properties and the general financial condition of the country, so that our stock would be affected and all other stocks would be affected for the time being; that it would be a disturbing factor. I protested personally that I could not see anything in the suggestion of building that railroad. I did not see that it would amount to anything. I did not believe in it at all. It did not go to the New York waters, and I did not see how they could get coal to New York Harbor or to any other terminals so that they could be a serious factor. To that the answer simply was that the mere threat of doing that would affect Erie securities and affect all the rest of us. \* \* \* In the mean-

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time the New York parties concluded that in some way they would take these collieries, whether we went in or not, and then I was called upon again to see in what way, if they did take them, a holding company could be created. The usual suggestion was made in New York that they become a Jersey corporation; but as a Pennsylvanian I had been adverse to New Jersey getting jurisdiction over Pennsylvania property, and I have always tried in my business and in my practice to have Pennsylvania corporations hold Pennsylvania properties. I think it is wiser and better to have the governmental jurisdiction where the property is. I got thinking over it and just about that time my co-stockholders in the Temple Iron Company were very tired of the business and so was I. It just occurred to me that that charter was the very one that would answer this purpose, and I sent for the Messrs. Smith and asked them whether they would sell their stock, and they said they would, at a figure that they named; and there was Frank Smith and Broden who had a few shares, a small interest in the company, and they all agreed. After finding we could do that, I told the Reading people that the advantage to the Reading Company would not only be in having an interest in these coal properties, which were reported very valuable by this committee, but that it would insure the continuance of that Temple Furnace on the line of the Reading road, and that I was not sure that we would continue it long, that I was too busy to be bothering with running an anthracite furnace. It was very important; how important it is you may understand when I say that a furnace on a railroad is about the best freight producing plant that you can have. That iron furnace pays over on the average about \$30,000—probably higher than that—a month freight on the inward freight alone. The consumption of coal, of limestone, and ore, that we call the raw materials that go into a furnace for the smelting of iron, creates a great many tons, and, whilst the rates are not very high on those raw materials, the tonnage is very heavy. We finally agreed on the part of the Reading Company that if the New York friends, Coster, insisted upon it, we would join them on one other condition, namely, that we should go in the syndicate. I thought that probably there might be some money made in the syndicate, as there was, of course. I mean that the [468] bonds were sold at a figure that was tempting. \* \* \* Then we agreed simply to take the Simpson & Watkins collieries, and the question came up of guaranty. These people that were selling and the bankers who were to handle the bonds wanted what we called a joint guaranty. I did not want a joint guaranty with some of the companies that I did not think were quite as strong as we were, and the executive board of the Reading, Mr. Harris, and Mr. Welsh and Mr. Dickson, sustained me in that. Then the question was how to fix up the guaranty. I suggested that we take the tonnage of each of the companies that had gone in for the preceding year and divide that up and make that the percentage that each was to guaranty.

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"By Mr. REYNOLDS:

"Q. The anthracite tonnage?—A. The anthracite tonnage, and divide it up and that fixed the percentages. That was reported to the different presidents, and I suppose their boards took action; I do not know. They are all separate agreements. That is a matter of record."

The transaction was then carried out as theretofore arranged as follows: On January 26, 1899, the capital stock of the Temple Iron Company having been purchased as noted, its stock was raised to two and a half millions and its bonds issued for three and a half millions. On February 27, Simpson & Watkins conveyed to it the capital stock of the eight collieries, taking in payment \$2,260,000 of its capital stock and \$3,500,000 of the bonds. On the same day they transferred to the Guaranty Trust Company, as trustee, this \$2,260,000 of stock and \$2,100,000 of bonds, and received therefor \$3,238,396.66 in cash and certificates of beneficial ownership in \$1,000,000 of the stock; the trustee purchasing from Mr. Baer for \$151,603.34 the remaining \$240,000 of original shares of the Temple Iron Company. On the same day, as part of the plan, the Reading Company, the Central Railroad of New Jersey, the Lehigh Valley Railroad Company, the Delaware, Lackawanna & Western Railroad Company, the Erie Railroad Company, and the New York, Susquehanna & Western Railroad Company, severally contracted with the Guaranty Trust Company and the Temple Iron Company to buy at par 29.96 per cent, 17.12 per cent, 22.88 per cent, 19.52 per cent, 5.84 per cent, and 4.68 per cent, respectively, in all 100 per cent, of the capital stock of the Temple Iron Company, and to guaranty the same percentages of its funded debt, principal and interest. These percentages as testified to by Mr. Baer, were arrived at on the basis of the respective anthracite tonnage of the several roads as quoted above. At the same time it was covenanted that, if in any period of six months the earnings of the Temple Iron Company should be insufficient to provide for its sinking fund, the interest on the bonds, and its "stock reserve" charge, the carrier-guarantors should pay the trust company up to 12½ cents per ton on every ton of coal carried by them from the mines of the company, and,

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if there still remained a deficit, it should be paid by the carrier-guarantors in the proportions noted above. Subsequently, on April 12, each carrier entered into a supplementary contract with the trust company, to enable the latter "to take such action as may be necessary to enforce the terms of guaranty and the other covenants of said agreement of 27th of February, 1899, so as to work out equitable results and protect and safeguard the rights and obligations of \* \* \* the several guarantors in the event of the failure of \* \* \* any one or more of the guarantors to [469] comply with the terms of any such guaranty and to keep and perform the covenants in any such agreement."

The consummation of this plan effectually defeated the project of the new railroad and led to its abandonment, and it is to this the witness Sturges refers in his testimony:

"A few months afterwards, I cannot give the exact dates, a number of these collieries pledged to our road, or rather the stock in a number of these companies, and the collieries too, were sold. I only know to whom by hearsay, except in one case. That, of course, absolutely crippled our road."

Does this combination of all of the defendant railroads for the avowed purpose and with the effect of preventing the threatened building of a competitive road for the transporting of coal in interstate commerce fall within the ban of the statute? That the Temple Iron Company is a mere holding company, the instrument for effecting the purpose of the combination, is apparent from the proof, and indeed, as we have seen in the testimony of Mr. Baer, is conceded. The ownership of its stock was and is now in the defendant railroads, the Temple Iron Company being a mere convenient, unitary holding agency for joint, combining railroad interests. If this combination, which the proofs show was made by all these defendant railroads, is not within the prohibition of the statute, what legal bar is there to these railroads, through the agency of the Temple Iron Company, jointly and in combination, absorbing the remaining anthracite coal not now owned by their subsidiary coal companies? There is none. The gist of the statute is combination; combination "in restraint of trade or commerce among the several

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states." Indeed, there is a potency in the united members of a combination so far in excess of the aggregate of the separate disunited strength of its members that the law, apart from this statute, has not overlooked it. In *Morris v. Barclay*, 68 Pa. St. 173, 8 Am. Rep. 159, the Supreme Court of Pennsylvania, referring to a combination affecting a single region only of the bituminous field, which covers many thousand miles where the anthracite covers a few hundred, said:

"The effects produced on the public interests lead to the consideration of another feature of great weight in determining the illegality of the contract, to wit, the combination resorted to by these five companies. Singly each might have suspended deliveries and sales of coal to suit their own interests, and might have raised the price, even though this might have been detrimental to the public interest. There is a certain freedom which must be allowed every one in the management of his own affairs. When competition is left free, individual error or folly will generally find a correction in the conduct of others. \* \* \* Men can often do by the combination of many what severally no one could accomplish and even what, when done by one would be innocent. \* \* \* There is a potency in numbers when combined which the law cannot overlook, where injury is the consequence."

And it will be observed that it is the calling of this combination into existence the law strikes at, without awaiting the exercise of its powers. "It is no answer," said the Supreme Court of Ohio, in *Central Company v. Guthrie*, 35 Ohio St. 666, "to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted on the public: [470] it is enough to know that the inevitable tendency of such contracts is injurious to the public." The purpose and effect of the combination of these defendant interstate railroads and of the defendant subsidiary coal companies would seem, therefore, to bring this transaction within the doctrine of the *Northern Securities case*, 193 U. S. 197, 331, 24 Sup. Ct. 436, 454 (48 L. Ed. 679), where it was said "that every combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in interstate trade or commerce is made illegal by the act." for

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the statute covers all combinations in restraint of interstate trade, whether by way of transportation or otherwise. It is no answer to this to say the Temple Iron Company has corporate power to hold the stock of mining companies. Concededly it has. The law forbids not the use, but the abuse, of the corporate powers of this Pennsylvania corporation. The question before us is not whether the Temple Iron Company had corporate power to own mines and mining stocks, but whether these six railroad companies have made the lawful corporate power of the Temple Iron Company to hold mines and mining companies' shares an instrument to enable them to jointly combine "in restraint of trade or commerce among the several states." If so, the act makes the combination unlawful without reference to the particular means used to effect the unlawful end. Indeed, to the contention that the Temple Iron Company was simply exercising its legal corporate powers it may be replied, as it was in *Aikens v. Wisconsin*, 195 U. S. 194, 25 Sup. Ct. 3, 49 L. Ed. 154, and reiterated in *Swift v. United States*, 196 U. S. 396, 25 Sup. Ct. 279 (49 L. Ed. 518):

"It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful."

And of the office of this holding Temple Iron Company it may be here said, as was of the combination using the Northern Securities Company in that case, that it is one which "restrains interstate commerce through the agency of a common corporate trustee designated to act for both companies in repressing free competition between them." So, also, in *Harriman v. Northern Securities Company*, 197 U. S. 291, 25 Sup. Ct. 503 (49 L. Ed. 739), the court in speaking of the *Northern Securities* case and that company said:

"Some of our number thought that as the Securities Company owned the stock the relief sought could not be granted, but the conclusion was that the possession of the power, which, if exercised, would prevent competition, brought the case within the statute, no matter what the tenure of the title was."

But it is urged that, because these eight collieries sell their product at the breaker, the transaction is wholly an

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intrastate act, and under *United States v. Knight*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, the act does not apply. Let us look at the kernel and not the shell of this transaction. The stock of the collieries which sell is owned by the Temple Iron Company, and the stock of the Temple Iron Company is owned by the defendant railroads. The latter are therefore the real sellers. And who are the real purchasers at the breaker? The [471] defendant coal companies whose stock is owned by the defendant railroads. And for what purpose do these latter buy this coal from themselves but to transport and sell the major part in interstate commerce? That the major part was interstate commerce the proofs show. Mr. Simpson, of the firm of Simpson & Watkins, says, referring to such product:

"Q. Where did you sell it when you sold it yourselves?—A. In the general market—New York, Oswego, Buffalo—wherever we could get a market for it. \* \* \*

"Q. What was your principal market while you were operating independently and selling in your own independent way?—A. New York was the principal market. \* \* \*

"Q. And with whom were you in competition in the markets in New York City and in other parts of New York state when you were selling coals on your own account?—A. Everybody that was in the business.

"Q. Your principal competitors then were either the anthracite coal carrying roads, operating in their own name, or operating through coal companies which they controlled?—A. The Delaware, Lackawanna & Western Railroad Company, the Lehigh Valley Railroad Company, and the Ontario & Western Railroad Company through Dickson & Eddy, their sales agent."

To the same effect is the testimony of E. B. Thomas, president of one of the carrier roads:

"Q. Where was the coal from the Simpson & Watkins' collieries moving at that time?—A. Moved over all of those roads.

"Q. Where? To what point?—A. All over, wherever they could find a market for it.

"Q. Was it coming to tide water?—A. Some of it came to tide water. Some of it went west to different points."

And that railroad carriers are "instruments of commerce and their business is commerce itself" was held in *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007. So while in isolation this is a



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sale of the coal at the breaker by one corporation to another corporation—a local transaction—yet in combination it is but one of the elements in a chain whereby the six defendant railroads handle their joint produce in interstate trade—a product which might otherwise have gone to this projected road. The several acts which contribute to the final result must be judged not in isolation, but in combination. For, while it is said in the *Addyston Pipe case*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, that, “where the contract affects interstate commerce only incidentally and not directly, the fact that it is not designed or intended to affect such commerce is simply an additional reason for holding the contract valid and not touched by the act of Congress,” it was also held that “any agreement or combination which directly operates, not alone upon the manufacture, but upon the sale, transportation, and delivery of an article of interstate commerce, by preventing or restricting its sale, etc., thereby regulates interstate commerce to that extent and to the same extent trenches upon the power of the national Legislature and violates its statute.”

It is manifest, therefore, that while in corporate forms there are sales, corporate holdings, etc., which in isolation may be intrastate, the fact is equally clear that when combined the transaction as a whole falls within the domain of interstate commerce. For, as was said in *Loewe v. Lawlor*, 208 U. S. 301, 28 Sup. Ct. 301 (52 L. Ed. 488):

[472] “Although some of the means whereby the interstate traffic was to be destroyed were acts within a state and some of them were in themselves as a part of their obvious purpose and effect beyond the scope of federal authority, still, as we have seen, the acts must be considered as a whole, and the plan is open to condemnation, notwithstanding a negligible amount of intrastate business might be affected in carrying it out.”

Singly and uncombined these six defendant railroads may continue their lawful operations with that natural, untrammelled competition incident to individual rivalry; for, as we have seen above, “when competition is left free, individual error or folly will generally find a correction in the conduct of others.” But it is when and because they unite—for the words “contract,” “combination,” “conspiracy,” imply a

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coupling with others—and when that coupling is “in restraint of trade or commerce among the several states,” that the federal statute becomes applicable.

It appears then by the proofs:

First. That the construction into the anthracite region of an additional competitive carrier of interstate commerce, the New York, Wyoming & Western Railroad, was threatened and feared.

Second. That the product of Simpson & Watkins’ eight collieries entered largely into interstate commerce, and the diversion of this product and other interstate commerce was promised to and threatened to be divided by such new road.

Third. That the six defendant railroads combined to prevent the building of the competitive road, and the possible diversion of interstate commerce by the reorganization of the Temple Iron Company and the joint ownership of its stock, by purchasing through such company the stock of the Simpson & Watkins collieries, detaching such collieries from the support of the proposed road, thereby causing its abandonment and later removing the interstate product of such collieries for all time from the field of interstate freight competition, as they did in some cases when the perpetual 65 per cent contracts were later agreed upon.

To us it is therefore clear that the combination of these six defendant railroads in the Temple Iron Company was a combination “in restraint of trade or commerce among the several states,” and falls within the prohibition of the statute.

We are next brought to consider whether certain contracts, known as the 65 per cent contracts, entered into between these railroads, through their subsidiary coal companies, with mine-owners who are parties to this bill, were also “in restraint of trade or commerce among the several states.” This part of the case is covered by the second ground of relief, set forth in the government’s brief which is as follows:

“That the 65 per cent contracts, so called, made by the defendants, the Philadelphia & Reading Coal & Iron Company, the Lehigh & Wilkes-Barre Coal Company, the Lehigh Valley Coal Company, the Delaware, Lackawanna & Western Railroad Company, and Hillside Coal & Iron Company, with the various producers who are before the court, for the control of their output, are in violation of the said act,

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and that all parties thereto, respectively, are enjoined from further carrying them out."

[473]—being charged in clause "a" of paragraph 7 of the bill, and relief for which is asked in the petition's second prayer for relief.

The proofs before us show, and the Supreme Court in *Interstate Commerce Com. v. Baird*, 194 U. S. 42, 24 Sup. Ct. 563, 48 L. Ed. 860, held, that these contracts involved interstate commerce. The length of this opinion will not permit reference to the testimony, but it shows that the terms of these contracts were agreed upon by the joint action of the six defendant railroads, their subsidiary coal companies and mine-owners, and that all of said persons and companies were concerned in and were thereby affecting interstate commerce. The form of contracts being thus agreed upon, they were thereafter entered into by individual mine-owners and the subsidiary coal companies of the six defendant railroads on whose lines the mines were located. Under each of these contracts the entire product of a particular mine was sold until exhaustion to one of the subsidiary coal companies at the breaker, and shipments therefrom were only to be made as that company required. Not only had the owner no power to mine except as the buyer required, but he had nothing to do with fixing the price which was determined by the general tidewater rate. Save in operation the mine was practically owned by the subsidiary coal company, the only guaranty of production the operator had was that the coal company agreed "it will not discriminate in favor of its own mines, or that of any persons, firms or companies with which it had contracts to buy coal, but that the quantity to be ordered monthly shall be a just proportion of the entire quantity of coal agreed to be purchased by the buyer, measured by the colliery capacity of the respective sellers." It further appears that where similar contracts had been limited to seven years, as they usually had been up to that time, they had not precluded competition. Indeed, the expiration of such seven-year contracts had made possible the projection of two carrier roads, and the testimony shows that the perpetuity clause was insisted on and inserted in the contracts thereafter by the combined action of the de-

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fendant railroads and their coal companies in order to withdraw from competition for all time the freights of these producers. The result of the combination was the operators got a raise to 65 per cent, and the defendant railroads eliminated competition. It would therefore seem clear that the product of these mines, which had before entered into competitive interstate commerce, was withdrawn therefrom, and, such being the case, it follows that the instrument by which this was done, to wit, the contracts entered into in pursuance of joint action, was a combination, "in restraint of trade or commerce among the several states." It is contended, however, the right of contract is a personal, absolute one, and if a mine-owner and a carrier agree thereto the law cannot interfere. But the answer to this is, we are here dealing with a combination, a combination of interstate carriers and owners of a product entering into interstate commerce, and, when such is the case, even the right to contract and combine must give way to a statute which declares that such contracts and combinations where "in restraint of trade and commerce among the several states" are illegal. It is but just to say that taking into consideration all the [474] factors involved in ownership, mining, transporting, and sale of coal, these contracts may on the whole be as fair, reasonable, and satisfactory a solution of the intricate economic questions involved as can be worked out. To quote from the testimony of an operator of long experience and broad-minded view:

"Q. Why did you think the railroads ought to purchase the individual operators' coal?—A. I thought that was the best way to handle the business. Understand that anthracite coal is a domestic fuel and it is used in the winter time, and to get the dealer and the consumer to buy it through the summer time you have to give them some inducement. I talked to the railroad people a good many years. I said: 'The thing you ought to do is to buy the individual operators' coal at the mines on some agreed system, or price, or something of that kind, because we cannot induce the consumer to take our coal in the summer time and give the men full work through the summer time. We cannot get the dealers to stock up and we cannot afford to have yards and agencies all over, as you can.'"

But conceding the fairness, as we have said, of these contracts, the fact still remains they are at variance with the adjudged intent of the statute to maintain in interstate trade

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an untrammelled flow of commerce in obedience to free and unrestrained competition. That these contracts do restrain commerce is clear from their terms and effect, and if they do not fall within the ban of a statute "aimed," as was said in *Chesapeake & Ohio Fuel Co. v. United States, supra*, to "maintain interstate commerce on the basis of free competition," then that statute is made of no avail by contracts which shut out competition for all time, and which, if increased in number, may without absolute purchase and ownership end in the defendant railroads' acquisition of the remaining coal area. We are therefore of opinion these contracts, as they now stand, are illegal.

Seeing, then, that these six defendant railroads did unlawfully combine together, through the Temple Iron Company, and that thereafter in further combination they brought about these illegal perpetual contracts, the duty of the court seems clear to forbid them further maintaining their unlawful combination in the Temple Iron Company and from continuing these unlawful contracts; for, if the Temple combination was illegitimate in birth, when did the taint of illegitimacy leave it? The Anti-Trust Act, as it seems to me, is directed not only at the illegal acts an illegal combination does, but also at the existence and continuance of such illegal combination. Moreover, in this case it is not only because the combination in the Temple Iron Company was originally illegal, but because it can be used in the future as it has been in the past, and because its existence to-day tends to forbid, prevent, and restrain competition, that this court should decree such illegal combination should end. And this case exemplifies the need of such a decree. Following the absorption of the stock of the Simpson & Watkins collieries by the Temple Iron Company, the product of some of those collieries was, when the 65 per cent contracts were afterwards determined on, bound in perpetuity to certain of these carriers through such contracts. By such perpetual contracts in their joint holdings and by the perpetual contracts these defendant railroads through their subsidiary coal companies severally made with other collieries these combiners withdrew, and still continue to with[475]draw,

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such product, for all time, from competition, either in interstate transportation or sale. To my mind there is no more subtle and effective agency for the gradual, unnoted absorption by interstate carriers of the remaining interstate product than these perpetual contracts. Holding then that they are in the words of the statute "contracts \* \* \* in restraint of trade or commerce among the states," I record my dissent to the action of the court in refusing to enjoin them.

LANNING, Circuit Judge.

The government charges in its petition that the defendants have entered into a series of combinations or conspiracies in violation of sections 1 and 2 of "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, hereinafter called the "Anti-Trust Act." The allegations are that these combinations or conspiracies restrain interstate commerce and monopolize a part of such commerce in the sale and transportation of anthracite coal mined in the Wyoming region of Pennsylvania. The petition contains, in addition to the usual general prayer for relief, five specific prayers for the destruction of five of the combinations described. These combinations are: (1) The one by which, in 1898, the Erie Railroad Company, through an increase of its capital stock, acquired the capital stock of the New York, Susquehanna & Western Railroad Company; (2) the one by which the Temple Iron Company, in 1899, through an increase of its capital stock and an issue of bonds acquired the capital stocks, assets, and properties of what were known as the Simpson & Watkins Coal Companies, and by which the Reading Company, the Lehigh Valley Railroad Company, the Delaware, Lackawanna & Western Railroad Company, the Central Railroad Company of New Jersey, the Erie Railroad Company, and the New York, Susquehanna & Western Railroad Company simultaneously entered into contracts for the acquisition of the capital stock of the Temple Iron Company; (3) the one by which, in 1901, the Reading Company, through an increase of its capital stock

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and bonded indebtedness, acquired the capital stock of the Central Railroad Company of New Jersey; (4) the one by which, in 1900 and subsequent years, the defendant carriers and their subsidiary coal companies agreed, in a series of contracts known in the record as the 65 per cent contracts, to purchase from certain other coal companies all the anthracite coal thereafter produced by the collieries of the latter companies; and (5) a combination or conspiracy, alleged to have been formed in 1895 by the defendant carriers and their subsidiary coal companies for the control of interstate commerce in anthracite coal, and in the development of which it is further alleged the four preceding combinations and one other (the one by which, in 1899, the Erie Railroad Company acquired the capital stocks of the Pennsylvania Coal Company and the Delaware Valley & Kingston Railroad Company) were used as "steps."

Two preliminary matters should be first disposed of; one a motion to dismiss the petition on the ground of multifariousness, and the other a motion to strike out certain parts of the proofs offered by the United States and objected to by the defendants.

[476] Twenty of the defendants have raised, either by way of objections embodied in their answers or by simple motions to dismiss, the defense of multifariousness. This defense was not brought to the attention of the court until after the United States had concluded its testimony in chief. The court then postponed its consideration until the final hearing. It is clear, however, that the defendants who insist upon this defense stand in no better position now than they did when they first brought the matter to the attention of the court. It is the general rule of practice in courts of equity that a defendant loses his right to insist upon an objection that a petition or bill is multifarious unless he raises that defense by demurrer or plea or answer filed specially for that purpose. He cannot, by answering generally and omitting to plead or demur, require a complainant to take his testimony and then, after the expense of taking such testimony has been incurred, insist, as a matter of right, upon multifariousness as a defense. Such a defense is not

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to the merits of the case but to the form of the suit. It follows, therefore, that as a rule if it is possible for the court, where the defense of multifariousness is not regularly presented in one of the ways above stated, to make a decree which shall properly dispose of the issues involved, the petition or bill will not be dismissed. *Veghte v. Raritan Water Power Company*, 19 N. J. Eq. 142; *Annin v. Annin*, 24 N. J. Eq. 184; *Bunnell et al. v. Stoddard et al.*, Fed. Cas. No. 2,135; *Oliver v. Piatt*, 3 How. 333, 411, 11 L. Ed. 622; *Nelson v. Hill*, 5 How. 127, 131, 12 L. Ed. 81; *Hefner v. Northwestern Life Insurance Company*, 123 U. S. 747, 751, 8 Sup. Ct. 337, 31 L. Ed. 309; *Graves v. Ashburn*, 215 U. S. 331, 30 Sup. Ct. 108, 54 L. Ed. 217. Assuming that the petition is multifarious and that the defense might have been sustained on a simple demurrer, there is no difficulty, except that of examining the evidence as to the several issues involved, in disposing of the case and entering a decree consistent, as we think, with its equities.

The motion to strike out proofs relates to certain exhibits and testimony. It is not necessary to pass upon this motion for the reason that, whether the proofs be in or out, the conclusions expressed in this opinion, at least, will remain the same.

Before entering upon a consideration of the nature and effect of the combinations here complained of, it may be well, also, to recall some of the expressions of the Supreme Court as to the kind of combinations that are condemned by the Anti-Trust Act.

"The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate." *Hopkins v. United States*, 171 U. S. 578, 592, 19 Sup. Ct. 40, 45, 43 L. Ed. 290.

"Where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed,



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and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose [477] or object." *Anderson v. United States*, 171 U. S. 604, 615, 19 Sup. Ct. 50, 54, 43 L. Ed. 300.

"An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce." *United States v. Joint Traffic Association*, 171 U. S. 505, 568, 19 Sup. Ct. 25, 31, 43 L. Ed. 259.

"The purpose of the act of July 2, 1890, was to prevent the stifling and the substantial restriction of competition in interstate and international commerce. The test under that act of the legality of a combination or conspiracy is its direct and necessary effect upon such competition. If its necessary effect is but incidentally or indirectly to restrict competition, while its chief result is to foster the trade and increase the business of those who make and operate it, it is not violation of this law." *United States v. Standard Oil Company*, 173 Fed. 177, 188.

"If the necessary, direct, and immediate effect of the contract be to violate an act of Congress, and also to restrain and regulate interstate commerce, it is manifestly immaterial whether the design to so regulate was or was not in existence when the contract was entered into. In such case the design does not constitute the material thing. The fact of a direct and substantial regulation is the important part of the contract, and, that regulation existing, it is unimportant that it was not designed." *Addyston Pipe & Steel Company v. United States*, 175 U. S. 211, 234, 20 Sup. Ct. 96, 105, 44 L. Ed. 136.

1. Coming to the merits, the first question to be considered is: Was the acquisition, in 1898, by the Erie Railroad Company of the capital stock of the New York, Susquehanna & Western Railroad Company effected by a combination or conspiracy in restraint of trade or commerce among the several states, contrary to the provisions of section 1 of the Anti-Trust Act, or promotive of a monopoly of any part of the trade or commerce among the several states contrary to the provisions of section 2 of that act?

On March 11, 1898, the Erie Railroad Company obtained from the New York, Susquehanna & Western Railroad Company a lease of the latter company's railroads, dated February 24, 1898, for the term of one year from March 1, 1898. The lease set forth, amongst other things, the purpose of the Erie to increase its capital stock by adding thereto \$13,000,-

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000 of first preferred and \$13,000,000 of common stock and exchanging it, at the rates therein mentioned, for stock of the Susquehanna. On April 2, 1898, the Legislature of New Jersey consented to this lease. Between March 18 and June 30, 1898, the Erie Railroad Company acquired substantially all of the capital stock of the New York, Susquehanna & Western Railroad Company by exchanging its \$26,000,000 of stock for the stock of the Susquehanna.

It is alleged in the petition that the Erie and the Susquehanna operate substantially parallel, and, in the absence of a restraining agreement or combination, competitive lines of railroad between the anthracite coal regions in Pennsylvania and tide-water points at New York Harbor, and that the Erie, by issuing its additional stock to the amount of \$26,000,000 and exchanging it for the stock of the Susquehanna, brought the two formerly competitive railroad companies and their subsidiary coal companies under a common head and source of control and thereby, in violation of the Anti-Trust Act, removed all inducements for competition between them and established a monopoly in interstate transportation and sale of anthracite coal. The answer [478] of the Erie denies that the two companies were ever in a true sense competitors, or that it has in any wise violated the Anti-Trust Act, and avers that the Erie is one of the greatest carriers of western produce, that the Susquehanna has no such traffic, that both of the companies are carriers of anthracite coal to New York but from different sources of supply, that the Erie has a great freight and passenger business, that its terminal facilities at New York Harbor are inadequate, that the Susquehanna has larger tunnel and yard facilities at New York Harbor than it needs, and that the acquisition of the Susquehanna by the Erie enabled the Erie to use the tunnel and yard facilities of the Susquehanna. The answer of the Susquehanna also denies that the two companies are competitors for the transportation of coal, or that any competition between the two companies has been prevented or interfered with, or that the price of coal has by any of its agreements been in any manner controlled, and avers that the purchase of the stock of the Sus-

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quehanna by the Erie was made within the state of New York, that it was not in restraint of interstate trade or in violation of the Anti-Trust Act, that, at the time of the exchange of stocks, the lines of the Erie were many miles distant from any territory in the coal regions served by the Susquehanna (though it is admitted that, since the purchase, by traffic arrangements with the Erie and Wyoming Valley Railroad Company, the Erie has reached some mines in the territory previously reached by the lines of the Susquehanna), and avers, further, that the two companies have continued to connect with and carry coal from different mines, except that the Susquehanna had received traffic previously carried over the lines of the Erie because of the greater convenience in delivering to purchasers.

In 1872 or 1873 the New Jersey Midland Railroad had been built from Jersey City, N. J., to Middletown, N. Y., a distance of 88 miles, and previous to 1883 it had passed under the management of the Susquehanna. The Erie was also then operating a road between the same points; both roads passing through Paterson and Passaic, in the state of New Jersey. Some time previous to 1883 the Susquehanna had extended its road to Gravel Place, three miles northwest of Stroudsburg, Pa. It then began to transport coal delivered to it at Gravel Place by the Delaware, Lackawanna & Western Railroad Company to West End, near New York Harbor, whence, in the absence at that time of a terminal of its own, it sent such coal over the lines of the Delaware, Lackawanna & Western to the latter's terminal at Hoboken, N. J. After the Susquehanna had acquired a terminal of its own at Edgewater, on New York Harbor, and extended its line through its ownership of the capital stock of a subsidiary company to Wilkes-Barre, Pa., both of which it did in 1893, its coal carrying business rapidly increased. The subsequent extension of its lines to Minooka in 1897, and its connection with the Delaware & Hudson Railroad, the Lehigh Valley Railroad, and the Central Railroad of New Jersey, in the Wyoming coal region, enabled it to declare in its annual report of June 30, 1897, that the completion of the road to Minooka placed the Susquehanna "in an independent position in re-

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spect to the transportation of coal." It was then in a position to [479] transport to its terminal at Edgewater coal from the mines tributary to the Delaware & Hudson Railroad in the valley between Wilkes-Barre and Carbondale, from the mines tributary to the Lehigh Valley Railroad in the same valley, and from the mines tributary to the New Jersey Central Railroad, as well as from the mines tributary to its own line. Though the Erie and the Susquehanna were free to extend their lines and thereby increase their business as common carriers of anthracite coal, it is clear that the more the business was thus increased the greater were the opportunities for competition between them. Each of them did, in fact, transport to New York Harbor coal from the collieries of the Pennsylvania Coal Company and the Hillside Coal & Iron Company. After the Susquehanna had put itself "in an independent position with respect to the transportation of coal," it and the Erie controlled lines which, without doubt, enabled them to compete in the procurement and the transportation of coal.

With such conditions existing prior to and at the time of the acquisition of the Susquehanna by the Erie, it is contended on behalf of the United States that the principles applied in *Northern Securities Company v. United States*, 193 U. S. 197, 326, 24 Sup. Ct. 436, 48 L. Ed. 679, are applicable. There it was held that the principal, if not the sole, object of the combination was to carry out the purpose of destroying competition between the constituent companies and thereby to put a restraint upon interstate commerce. Here, however, it is argued, on behalf of the defendants, that the proofs fail to show any purpose of destroying competition or of promoting a monopoly in interstate commerce. The principal object of the combination, the defendants say, was to promote public convenience and interests, and that, conceding that the combination does eliminate the competition that previously existed between the two railroads, it is but an incidental restraint of interstate commerce.

The tabulated statements in evidence do not show the gross earnings of the Erie and the Susquehanna systems for 1897 or 1898. They do show, however, that the gross earnings

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of the Erie for the fiscal year ending June 30, 1900, were something over \$38,000,000, and that the gross earnings of the Susquehanna for the fiscal year ending June 30, 1897, were but a little over \$2,000,000. In 1898 the two roads reached Paterson, N. J., and Middletown, N. Y.; but the competition between them at those places was certainly very inconsiderable. More than one-half of the gross earnings of the Susquehanna was from freight on coal alone; the remaining part being from freight on merchandise, and from passengers, mail, express, and miscellaneous sources. Whatever of competition between the two roads there was, it was almost exclusively in the coal carrying business from the Wyoming region. The Susquehanna has no through freight business except as a coal carrier. It appears, too, that in 1898 the Susquehanna had larger terminal facilities at Edgewater, N. J., than it required at that point, that the terminal at Weehawken, about five miles south of Edgewater, was not an adequate one at that point for Erie's great and growing business, that the terminal facilities of the Susquehanna's freight business, exclusive of coal, in Jersey City and [490] New York, were restricted to small quarters in the terminals of the Pennsylvania Railroad Company, that the acquisition of the Susquehanna by the Erie enabled the Susquehanna to take its general freight business from the Pennsylvania's terminals to those of the Erie in New York, and that by the acquisition the convenience of both the Erie and the Susquehanna was promoted and the interests of the public subserved. The total amount of anthracite coal transported to New York Harbor over the Erie in 1907 was 1,346,414 tons. Since the Erie acquired the stock of the Susquehanna, the latter road has lost much of its tonnage of anthracite coal, not to the Erie but to the Delaware & Hudson Railroad, and Mr. Johns, the superintendent of the Susquehanna, says that the Susquehanna cannot now stand alone for the reason that, if its relations with the Erie were now severed, it would have no coal business left to it except that of a few mines which for ten months in 1908 produced only 216,310 tons.

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The argument that the primary object or effect of the acquisition of the stock of the Susquehanna by the Erie was to suppress competition in interstate commerce between those two roads is not convincing. So many other roads reached into the anthracite fields of Pennsylvania and transported coal to New York Harbor that the elimination of competition between the Erie and the Susquehanna in the anthracite coal business could have had no substantial effect upon the business, or upon the price of coal at New York Harbor. That suppression of competition was not the principal purpose of the combination seems to be shown by the lease of the Susquehanna to the Erie of February 24, 1898, which declared that the closer connection between the two roads thereby proposed would be for the public benefit, as well as for their mutual advantage, and by the act of the Legislature of New Jersey of April 2, 1898, by which consent to the proposed combination was given on condition that "neither of the said railroad companies shall increase the present rate or rates of the freight or passenger traffic of the said companies in this state." I think the proofs show that, whatever competition between them was eliminated by the combination, such elimination was so inconsiderable a thing that it did not enter into the objects which induced the Erie Railroad Company to increase its capital stock by \$26,000,000, and that it was but an incidental, and not the designed or principal, result of the combination. I conclude, therefore, that this combination is not violative of the Anti-Trust Act.

2. The second question is: Was the scheme by which the Reading Company, the Lehigh Valley Railroad Company, the Central Railroad Company of New Jersey, the Delaware, Lackawanna & Western Railroad Company, the Erie Railroad Company, and the New York, Susquehanna & Western Railroad Company acquired the capital stock of the Temple Iron Company, and by which the Temple Iron Company acquired the capital stocks, assets, and properties of the Simpson & Watkins Companies, a combination or conspiracy violative of the Anti-Trust Act?

Previous to 1899 the Temple Iron Company had been engaged in the manufacture of iron at Temple, near Reading,

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Pa. It had, how[481]ever, a liberal charter, which enabled it to own and operate mines. Having authorized its capital stock to be increased from \$240,000 to \$2,500,000, and its bonds to be issued to the amount of \$3,500,000, or, perhaps, in anticipation of such authorization, it, on February 27, 1899, entered into a contract with Simpson & Watkins by which that firm agreed to sell all of the capital stocks, assets, and properties of the Forty Fort Coal Company, the Mount Lookout Coal Company, the Wyoming Land Company, the Wyoming Electric Light Company, the Babylon Coal Company, the Sterrick Creek Coal Company, the Edgerton Coal Company, the Hendrick Land Company, the Northwest Coal Company, and the Lackawanna Coal Company (the last a limited copartnership) to the Temple Iron Company, for \$2,260,000 of the capital stock of the Temple Iron Company and the \$3,500,000 of its bonds; the bonds to be secured by a mortgage or collateral trust deed. On the same day Simpson & Watkins agreed that simultaneously with their receipt from the Temple Iron Company of its stock and bonds above mentioned they would transfer and deliver to the Guaranty Trust Company of New York, as trustee, the whole of their stock of the Temple Iron Company (\$2,260,000) and \$2,100,000 of the \$3,500,000 of its bonds, and the trustee agreed to pay to Simpson & Watkins \$3,238,396.66 in cash and to issue to them certificates of beneficial interest in \$1,000,000 of the stock. The trustee further agreed to purchase from Mr. Baer the remaining outstanding stock of the Temple Iron Company (\$240,000) at 60 per cent of its par value. It was also agreed that the trustee should have the power to sell beneficial interests in the stock; such interests to be expressed in certificates issued by the trustee to the purchasers. On the same day the Guaranty Trust Company, of the first part, and J. P. Morgan, and others, composing the underwriting syndicate, of the second part, entered into an agreement by which the parties of the second part agreed to purchase, on demand of the trustee, the \$2,100,000 of bonds at the rate of 90 per cent of their par value, and \$1,500,000 of the certificates of beneficial interest in the stock (being the residue of such certifi-

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cates after the delivery of \$1,000,000 of them to Simpson & Watkins) at par. Also, on the same day, the Reading Company (holding all of the capital stock of the Philadelphia & Reading Railway Company), the Lehigh Valley Railroad Company, the Delaware, Lackawanna & Western Railroad Company, the Central Railroad Company of New Jersey, the Erie Railroad Company, and the New York, Susquehanna & Western Railroad Company each entered into a tripartite agreement with the Temple Iron Company and the Guaranty Trust Company of New York, by which the Reading Company and the five railroad companies agreed to purchase from the trust company, not later than December 31, 1906, at par value with interest at 6 per centum per annum from the date of the last dividend thereon, all of the trust company's shares of the stock of the Temple Iron Company, in the following proportions, to wit (the proportions being the same as the total tonnages of coal carried by them from all sources in the year 1898): The Reading, 29.96 per cent; the Lehigh Valley, 22.88 per cent; the Delaware, Lackawanna & Western, 19.52 per [482] cent; the Central, 17.12 per cent; the Erie, 5.84 per cent; and the New York, Susquehanna & Western, 4.68 per cent. In these tripartite agreements the Reading Company and the five railroad companies also severally agreed, that, if the earnings of the Temple Iron Company for any period of six months ending June 30 or December 31 should not be sufficient for the sinking fund and interest payments in the agreements provided for, and 3 per cent on the par value of the stock of the Temple Iron Company, then each of the six companies would pay to the trust company, for the purpose of making up such deficiency, 12½ cents per ton for all coal carried by it from the Simpson & Watkins collieries for such period of six months, or so much of said sum as should be necessary to make up the deficiency, and, if there should still be a deficiency, then that each of the six companies would pay to the trust company such proportion of the remaining deficiency as should equal the proportion of stock agreed to be purchased by it. They also severally guaranteed, in the same proportions, the payment of the principal of the bonds at maturity, on January 1, 1925.



Lanning, C. J., concurring.

Thus was this combination effected. It went into operation, and, although the guarantor companies were compelled to pay to the trust company deficiencies in the earnings of the Temple Iron Company to the amount of \$483,000 for the year 1899 and the strike years of 1900 and 1902, the business of the Temple Iron Company has been highly successful. On December 4, 1908, when Mr. Law testified for the government, the Temple Iron Company had purchased out of its net earnings for its sinking fund \$1,900,000 of the bonds, the total issue of which was \$3,500,000, and had a surplus of a million dollars in its treasury; and on June 30, 1909, when Mr. Thomas testified for the defendants, all of the bonds except \$800,000 had been purchased by the Temple Iron Company and the \$483,000 paid by the guarantor companies to the trust company had been refunded. In December, 1906, the certificates of beneficial interest in the stock of the Temple Iron Company, which the trust company had issued for the whole of the 25,000 shares, and which were widely scattered amongst about 200 holders in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, and Pennsylvania, were called in by the trust company, and, pursuant to the provisions of the tripartite agreements, the whole of the capital stock of the Temple Iron Company, excepting 50 shares held by the directors, was acquired by the Reading Company and the five railroad companies who agreed to purchase it, except that the Reading Company's proportion was divided between it and some of its subsidiary corporations.

It appears, then, that the Guaranty Trust Company no longer holds any of the capital stock of the Temple Iron Company. It does hold, however, the trust mortgage by which the bonds of the Temple Iron Company are secured. What the terms of that mortgage are does not appear, nor is the trust company a party to this suit. The Erie Railroad Company, in its answer, avers that:

"The Guaranty Trust Company is still the trustee of the mortgage which secures the payment of the bonds which have been purchased by numerous [488] bondholders, whose rights should not be impaired herein without bringing them, or their trustees, into this court as a party defendant."

Lanning, C. J., concurring.

A similar averment is contained in the answer of the New York, Susquehanna & Western Railroad Company. The issue of the \$3,500,000 of bonds is one of the acts by which the Temple Iron combination was made possible. The destruction of the combination may impair the value of the bonds. The trustee of the bondholders would therefore seem to be a proper, if not an indispensable, party. Nevertheless, this point is not urged in the briefs, and I shall rest my decision on other features of this branch of the case.

A general act of the state of Pennsylvania, passed April 15, 1869 (P. L. 1869, p. 31), provides:

"That it shall and may be lawful for railroad and canal companies to aid corporations authorized by law to develop the coal, iron, lumber and other material interests of this commonwealth, by the purchase of their capital stock and bonds, or either of them, or by the guarantee of or agreement to purchase the principal and interest, or either, of such bonds, provided that this act shall not apply to the stock and bonds of any corporation possessing mining or manufacturing privileges in the county of Schuylkill."

There is no allegation in the petition raising the question whether a common carrier engaged in interstate commerce, by the mere act of purchasing, for the purpose of securing its transportation business, the capital stock of a coal mining corporation also engaged in interstate commerce, monopolizes a part of that commerce, or restrains it, contrary to the provisions of the Anti-Trust Act. If there were, then, since the contention of the government is that the defendant carriers by their purchase of the capital stock of the Temple Iron Company became the virtual owners of the mines whose capital stocks were owned by the Temple Iron Company, this court would, if it adopted that view, be required to consider one of the grave constitutional questions which the Supreme Court mentioned, but found it unnecessary to decide, in *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836, namely:

"Did the adoption of the Constitution and the grant of power to Congress to regulate commerce have the effect of depriving the states of the authority to endow a carrier with the attribute of producing as well as transporting particular commodities, a power which the states from the beginning have freely exercised, and by the exertion of which governmental power the resources of the several states have been

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developed, their enterprises fostered, and vast investments of capital have been made possible?"

Nor does the petition contain any allegation to the effect that the Reading Company, the Lehigh Valley Railroad Company, the Central Railroad Company of New Jersey, the Delaware, Lackawanna & Western Railroad Company, the Erie Railroad Company, and the New York, Susquehanna & Western Railroad Company, by purchasing the capital stock of the Temple Iron Company, which had simultaneously purchased the capital stocks of the Simpson & Watkins Companies, and by guaranteeing the payment of the obligations of the Temple Iron Company, created a combination in the nature of a copartnership for sharing the profits and losses of the Temple Iron Company, and that they thereby, in violation of the Anti-Trust Act, monopolized a part of the interstate commerce in anthracite coal. [484] Such a copartnership is suggested, it is true, in the brief of the government; but no issue of that kind is presented by the pleadings. As neither of these two important questions is in issue, they cannot properly be decided in this case.

The only complaint in the petition concerning the Temple Iron transactions is that after Simpson & Watkins and certain other independent operators in the Wyoming and Lehigh coal regions had "determined and agreed to promote the construction of a new line of railroad from the regions where their mines were located to tide-water," and after, for that purpose, they had "caused the New York, Wyoming & Western Railroad Company to be organized under the laws of the state of Pennsylvania," had secured "large subscriptions" to the capital stock of the company, had made surveys of its line, had purchased 7,000 tons of steel rails, and had secured pledges to it of "the tonnages of the aforesaid independent operators not already pledged by contract," the Reading Company, the Lehigh Valley Railroad Company, the Central Railroad Company of New Jersey, the Delaware, Lackawanna & Western Railroad Company, the Erie Railroad Company, and the New York, Susquehanna & Western Railroad Company, entered into the series of contracts of February 27, 1899, hereinabove mentioned, and

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thereby, through their concerted action: (1) Caused the construction of the projected New York, Wyoming & Western Railroad to be abandoned; and (2) pooled and divided amongst themselves (excepting the Reading Company) the tonnages of the eight Simpson & Watkins collieries. And the only prayer of the petition which specifically relates to the Temple Iron transactions, besides a prayer for injunction, is that we shall adjudge them illegal because thereby: (1) The Reading Company, the Lehigh Valley Railroad Company, the Central Railroad Company of New Jersey, the Delaware, Lackawanna & Western Railroad Company, the Erie Railroad Company, and the New York, Susquehanna & Western Railroad Company, through the instrumentality of the Temple Iron Company, acquired the Simpson & Watkins collieries "in pursuance of a combination or conspiracy between the defendants last named to defeat the construction of a competing railroad from the anthracite fields to tide-water"; and because (2) "in so acquiring, through the purchase of agreed percentages of the capital stock of the Temple Iron Company, ownership in common of the aforesaid collieries formerly owned by Simpson & Watkins, the said Lehigh Valley Railroad Company, Central Railroad Company of New Jersey, Delaware, Lackawanna & Western Railroad Company, Erie Railroad Company, and New York, Susquehanna & Western Railroad Company pooled and divided among themselves the tonnages from those collieries, thereby shutting out competition in its transportation." These two questions—one concerning the alleged defeat and abandonment of the proposed new railroad, and the other concerning the alleged pooling and division of tonnages—are the only questions on this branch of the case presented by the pleadings, and the only ones this court is now at liberty to consider.

It appears that Simpson & Watkins and other independent operators of anthracite coal mines were promoting the new railroad with [485] the declared intention of securing access to tide water at New York free from the domination of existing carriers whose transportation charges were complained of. But the charter of the new railroad authorized its construction "from a point in the Delaware river in

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Northampton county, Pa. (being also the boundary line between the states of New Jersey and Pennsylvania), opposite to or near Belvidere, N. J., and thence to a point on the Susquehanna river within or near Pittston, Luzerne county, Pa., with the necessary branches or laterals." It is not pretended that the new road was to extend to tide water or even across the Delaware river into New Jersey. It is said in the government's brief that at the point opposite to Belvidere—that is, at the eastern terminus of the proposed new road in Pennsylvania—connection could have been made with the Delaware Lackawanna & Western Railroad, the Central Railroad of New Jersey, the Lehigh Valley Railroad, and the Pennsylvania Railroad, all of which do reach tide water. It appears, however, that no arrangements of any kind had been made for any such connection. Mr. Edward B. Sturges, who was interested in the proposed road and subscribed for 500 shares of its stock, testified as follows:

"Q. The charter, or the articles of incorporation, only authorized this road to build a line as far as a point opposite Belvidere, N. J.. did they not?—A. That is all.

"Q. How was it contemplated to get from there to tide water?—A. We had not actually entered upon the construction of any road from there on. We thought we could get the transportation over some road. We knew that getting across New Jersey might be beyond our power.

"Q. What roads would you have connected with?—A. We could not tell. We never had made any arrangements at that time.

"Q. I do not mean what roads you could have actually entered into contracts with, but which you would have physically connected with?—A. The Delaware, Lackawanna & Western Railroad across the river, the New Jersey Central and the Lehigh Valley and the Pennsylvania below the Belvidere division. We never got that far because we felt that if we could get over to the New Jersey line we could get to New York or to tide water later. Later there was another arrangement made."

This admission by Mr. Sturges, who was a witness called for the government, taken with the fact that it does not appear that there was any railroad whatever on the Pennsylvania side of the Delaware river at or near the point opposite to Belvidere with which any connection could have been made, shows that the allegation of the petition that the purpose was to construct a new road from the coal

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regions to tide water is not supported by the evidence. It is certain that the new road could not, under its charter, have reached tide water or extended beyond the confines of the state of Pennsylvania. It matters not that the independent coal operators had been threatening to build a new road from the coal regions to tide water, or what influence that threat had, if any, upon the formation of the combination which absorbed the collieries of Simpson & Watkins. The allegation is that the combination defeated the construction of a new railroad from the coal regions to tide water; the fact is that the construction of such a road was never authorized by law, or even contemplated, and, consequently, that it was not defeated. Furthermore, there is no proof in the case that the Temple Iron combination directly [486] defeated the construction of any railroad whatever, either from the coal regions to tide water or from the coal regions to the Delaware river. It did not acquire the capital stock of the new railroad company and does not in any manner control its charter.

It may be observed, further, that the allegation of the petition is that the construction of the proposed new railroad has already been defeated and abandoned. The fourth section of the Anti-Trust act confers on Circuit Courts "jurisdiction to prevent and restrain" violations of the act. But this court cannot prevent or restrain a past violation of the act. There is no suggestion in the petition that the Temple Iron combination is still preventing the construction of the projected railroad. Nor does it appear that if the prayer for injunction should be granted the new railroad would be built. That prayer, in substance, is that the railroad companies shall be enjoined from voting on the stock of the Temple Iron Company which they own, and that the Temple Iron Company shall be enjoined from paying dividends to the railroad companies. It is not proposed to enjoin the Temple Iron Company from voting on the stocks of the Simpson & Watkins Companies, or to enjoin the Simpson & Watkins Companies from paying dividends to the Temple Iron Company. How would the present situation, in respect of the alleged defeat of the construction of the proposed new rail-

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road, be changed by enjoining the railroad companies from voting on the stock of the Temple Iron Company and enjoining the Temple Iron Company from paying dividends to the railroad companies? The gravamen of the complaint is that the construction of the proposed new railroad has been defeated, and that thereby interstate commerce has been restrained. The injunction we are asked to issue cannot restore a condition under which the probability of a resumption of the efforts to build the new railroad will be in any wise increased. Neither can we frame an injunction that will restore such a condition under the general prayer for relief. The petition makes no case on which a more sweeping injunction than the one specifically prayed for can be allowed, for none of the seven Simpson & Watkins Companies is a party defendant, except the Mount Lookout Coal Company and the Lackawanna Coal Company, and each of those two companies is a party defendant only in respect of the 65 per cent. contracts hereinafter considered.

If, then, any relief can be granted, under the allegations of the petition, against the Temple Iron combination, it must be because there was a pooling and division of the transportation business of the Simpson & Watkins collieries amongst the Lehigh Valley Railroad Company, the Central Railroad Company of New Jersey, the Delaware, Lackawanna & Western Railroad Company, the Erie Railroad Company, and the New York, Susquehanna & Western Railroad Company. It is not charged that the Philadelphia & Reading Railway Company (whose capital stock is held by the Reading Company) obtained any part of the tonnage of those collieries. The fact is that none of the eight Simpson & Watkins collieries is tributary to the Philadelphia & Reading Railway Company. I understand, too, that none of them is tributary to the Central Railroad Company of New Jersey. They are located at widely separated points in the Wyoming [487] region. With one or two exceptions, each of them is tributary to a single railroad. The productions of the Northwest, Edgerton, and Sterrick Creek collieries are carried by the Erie, of the Lackawanna colliery by the Erie, the Delaware, Lackawanna & Western, and the New York, Susquehanna &

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Western, of the Babylon and Mount Lookout collieries by the Lehigh Valley, of the Forty Fort and Harry E. collieries (both owned by the Forty Fort Coal Company) by the Lehigh Valley and the Delaware, Lackawanna & Western. The proportions in which the six carriers ( considering the Reading Company, the holder of the capital stock of the Philadelphia & Reading Railway Company, as a carrier) agreed in the tripartite contracts to purchase the stock of the Temple Iron Company were not fixed by the tonnages of the eight collieries alone. Had they been, the Reading Company and the Central Railroad Company of New Jersey would have acquired none of the Temple Iron stock. Those proportions were based on the total shipments of anthracite coal carried by the six carriers from all sources for the year 1898 (according to Mr. Baer) or for the five years from 1894 to 1898 (according to the contention of the counsel for the government). Neither in the tripartite agreements, nor elsewhere, does it appear that the productions of the eight collieries were thereafter to be carried by the six carriers in the proportions in which they agreed to purchase the Temple Iron stock. The conditions were such as to forbid the making of such a contract. And the tripartite agreements themselves show that no attempt to make any such contract was in the minds of the parties, for they assumed that the tonnages from the eight collieries over the several roads would vary from time to time, and therefore provided that if the earnings of the Temple Iron Company should be insufficient to meet its sinking fund, interest, and other charges, the carriers should make up the deficiency, not primarily in the proportions of stock agreed to be purchased by them, but by the payment by each carrier of a sum not exceeding 12½ cents per ton on such amount of coal as it should actually carry from the eight collieries. By this arrangement the Reading Company and the Central Railroad Company of New Jersey were exempt from such payments. Nor is there anything in the tripartite agreements, or in any other proven agreements, that shows that these six carriers have entered into an agreement not to compete with one another in the coal transportation business, or that forbids any of the carriers from extending



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its line to any or all of the eight collieries and transporting as much of the coal produced by them as it can get. Not only is any suppression of competition denied in the answers and by the defendants' witnesses, but they deny any purpose of bringing about such a result. The burden is on the government, therefore, to show that, under the combination, there was in fact a pooling and division amongst the carriers of the tonnages of the eight collieries. This it has failed to show.

3. The third question is: Was the acquisition, in 1901, of the capital stock of the Central Railroad Company of New Jersey by the Reading Company, effected by a combination or conspiracy in restraint of trade or commerce among the several states?

The petition alleges that about January, 1901, the Reading Com[486]pany, which then held and still holds all of the capital stock of the Philadelphia & Reading Railway Company, issued additional shares of its capital stock to the amount of \$8,017,650 of first preferred and \$1,713,750 of second preferred, par value, and created an additional bonded indebtedness of \$23,000,000, due in 1951, which it gave to the holders of the capital stock of the Central Railroad of New Jersey for 145,000, being a majority, of the shares of that stock, and thereby brought under one controlling power those two carrier companies, which, it is alleged, operated parallel and competitive lines. This, it is said, destroyed competition between them and their subsidiary coal companies and promoted monopoly. The answer of the Reading Company denies that the Philadelphia & Reading Railway and the Central are parallel or competitive lines, declares that they are connecting lines, admits that on or about January 7, 1901, it agreed to purchase 145,000 shares of the capital stock of the Central, and avers that, to secure the payment of the \$23,000,000 of bonds which it issued to aid in financing the enterprise, it pledged the stock purchased from the Central, with other stock, as collateral, under an agreement dated April 1, 1901, which it executed and delivered, with the certificates for the stock, to the Pennsylvania Company for Insurances on Lives and Granting Annuities. The answer of

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the Central also denies that the two carriers operate parallel or competing roads, or that the scheme throttles competition or promotes monopoly.

In 1890 the Philadelphia & Reading Railroad Company, the predecessor of the defendant Philadelphia & Reading Railway Company, the most easterly point of whose line was at Bound Brook, N. J., 20 miles west of New York Harbor, determined to promote the construction of the Port Reading Road from Bound Brook to Arthur Kill, on the tide waters of the New York Harbor, in order to secure on that harbor coal terminal facilities of its own. The road was completed in 1892. Substantially all of the capital stock of the Port Reading Road was owned by the Philadelphia & Reading Railroad Company and passed, upon the sale of the latter's assets under the receiver's proceedings in 1896, to the defendant the Reading Company. The Reading Company, from 1896 to the present time, has held, as owner, substantially all of the capital stocks of the Philadelphia & Reading Railway Company and the Port Reading Railroad Company. By this extension the Philadelphia & Reading Railroad Company secured an outlet to New York Harbor for its coal. The terminal on Arthur Kill was not a convenient one for passenger or general freight traffic, and up to 1901, when a majority of the stock of the New Jersey Central was purchased by the Reading Company, nearly all of the traffic of the Philadelphia & Reading Railway Company going to and from New York, except its coal traffic, passed over the New Jersey Central between Bound Brook and New York. Prior to 1901 contracts between the Philadelphia & Reading Railway Company, the Central, and other roads, had been entered into for the establishment of joint through routes over their lines. These contracts largely benefited the Philadelphia & Reading Railway Company. In December, 1900, Mr. Baer, president of the Philadelphia & Reading Railway Company, was informed that a majority of the [489] capital stock of the Central Railroad Company of New Jersey was on the market for sale, and that the Baltimore & Ohio Railroad Company was a prospective purchaser of it. Fearing that, if the control of the Central should pass into the hands

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of the Baltimore & Ohio, the Philadelphia & Reading would lose the benefit of its contracts for joint through routes and be disastrously hampered in, if not excluded from, the use of the Central's New York terminals, he quietly bought the stock for the Reading Company. Evidently, the predominating motive in the purchase was to preserve to the Philadelphia & Reading its traffic arrangements with the Central. The direct effect of the purchase was to preserve them. The necessary effect of the combination was also to eliminate all possible competition between the Philadelphia & Reading and the Central in the anthracite coal carrying business. In the circumstances, however, such elimination, though a necessary result of the combination, was incidental to its main purpose and not in contravention of the Anti-Trust Act as it has heretofore been construed. The argument that the Philadelphia & Reading and the Central were not competing but were connecting roads is not sound. To a certain extent they did supplement each other, but as the Port Reading road gave to the Philadelphia & Reading an outlet to New York Harbor for its coal carrying business, without the use of the Central's road, the Philadelphia & Reading and the Central were, previous to the combination, in the position of competitive carriers of coal even though they did not reach the same mines or the same parts of the Wyoming region. Mr. Baer himself said:

"Q. What do you regard as competitors of the Philadelphia & Reading now in New York Harbor, as to anthracite coal?—A. All of the companies.

"Q. Won't you be good enough to name them for us?—A. All the companies that ship to New York. They would be the Pennsylvania Railroad, the Lehigh Valley, the Delaware & Lackawanna, the Delaware & Hudson, the Erie, Ontario & Western. I guess they are all the roads leading to New York directly or indirectly.

"Q. Those roads are all carrying anthracite coal to the New York Harbor?—A. Yes, sir.

"Q. And you regard them as competitors who must be considered in fixing rates?—A. Yes, sir; unquestionably."

I prefer to base our opinion, not on the ground that the two roads were not competitors in the anthracite coal carrying business, but on the other, even though it be the narrower,

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ground that whatever suppression of competition resulted from the combination it was but an incidental effect of a scheme to save the business of the Philadelphia & Reading. Indeed, the elimination of competition between the Philadelphia & Reading and the Central, in the anthracite coal carrying business, was too small a thing to have been an important element in the object of the combination. The proximity of the lines of the Delaware, Lackawanna & Western, the New York, Susquehanna & Western, the New York, Ontario & Western, the Erie, and the Delaware & Hudson, to the line of the Central, and of the Pennsylvania's line to the line of the Philadelphia & Reading, left the competitive conditions in the coal carrying business very slightly affected by the elimi[490]nation of competition between the Central and the Philadelphia & Reading.

I conclude that this combination was not violative of the anti-trust act.

4. The fourth question is: Are the contracts, referred to in the record as the 65 per cent contracts, contracts in restraint of interstate commerce?

The charge is that they are, and the prayer is that they be delivered up to be canceled, and that further operations thereunder be enjoined.

Long prior to 1869 the Delaware, Lackawanna & Western Railroad Company had been specially authorized by the Legislature of Pennsylvania to acquire and hold coal lands, and to mine, purchase, and vend coal. By a general act of that state, approved April 15, 1869, railroad and canal companies, as already stated, were authorized to aid corporations engaged in developing coal mines by the purchase of their capital stocks and bonds, or either of them. Pursuant to the policy of the state of Pennsylvania thus established, it appears that, before 1900, the Delaware, Lackawanna & Western Railroad Company had acquired coal lands, and that the Reading Company had acquired the capital stock of the Philadelphia & Reading Coal & Iron Company, the Lehigh Valley Railroad Company the capital stock of the Lehigh Valley Coal Company, the Central Railroad Company of New Jersey a majority of the capital stock of the

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Lehigh & Wilkes-Barre Coal Company, the Erie Railroad Company a majority of the capital stock of the Hillside Coal & Iron Company, and the New York, Susquehanna & Western Railroad Company a majority of the capital stock of the New York, Susquehanna & Western Coal Company. The Delaware, Lackawanna & Western Railroad Company and the above-mentioned subsidiary coal companies have each entered into one or more of the 65 per cent contracts.

For many years previous to 1900, when the first of these contracts was entered into, many of the smaller coal producing companies sold the products of their mines to the larger coal companies, producing and shipping coal in their respective neighborhoods, for certain percentages of tide-water prices. These percentages were increased from time to time until they reached 60 per cent. In the early fall of 1900 a general strike of the coal miners and laborers of the whole anthracite region took place, resulting in an entire cessation of the production of anthracite coal. Conferences were had, and a ten per cent. increase in wages was finally granted by the defendant carriers' subsidiary coal companies to their employees. This increase, of course, affected the independent coal companies. On October 1, 1900, at a meeting of "individual operators," in Wilkes-Barre, Pa., a committee was appointed "to confer with the presidents of the transportation companies and endeavor to learn if there is to be a reduction in the rates of freight to cover the advance in wages that they have offered to their employees." On October 5, 1900, at another meeting, in Scranton, Pa., the committee reported a recommendation that the "individual operators," post the "notice of advance of wages already made by the companies." The minutes of this meeting then proceed as follows:

[491] "After the reading of this report, Mr. Kemmerer [one of the members of the committee], in answer to the question as to what the presidents of the transportation companies had said regarding a reduction in the rates of freight to cover the proposed advance of ten per cent. in wages, said that the committee could not report a definite promise from them that there would be a reduction in the freight rates, but that they expressed their sympathy with the individual operators, and he intimated that they had said something would be

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done for the individual operators to improve the present conditions of the coal business."

The meeting resolved to post the notices, and then appointed a new committee of three persons "to confer with the various carrying companies relative to a new contract." This committee had a number of meetings with other gentlemen, who were officers of the defendant carriers and also of their subsidiary coal companies, in which there were negotiations concerning the terms of the proposed new contracts. The independent operators were demanding 65 per cent. The demand upon them was that, instead of having the contracts extend for a period of years, as the previous percentage contracts had done, they should continue for the life of their collieries. Mr. Cumming, vice president of the Erie Railroad Company and an officer of its subsidiary, the Hillside Coal & Iron Company, says that his reason for desiring the new contracts to cover the entire life of the collieries was "to have the question settled once for all." Other concessions were demanded of the operators. Finally, the form of contract now under examination was agreed on. It provides, amongst other things, that "the seller hereby sells and agrees to deliver on cars at the breaker to the buyer all the anthracite coal hereafter mined from any of its mines now opened and operated, or which may hereafter open and operate on the premises intended to be covered by this contract"; that "shipments shall be made from time to time as called for by the buyer"; that the buyer will "arrange to take the coal in as nearly equal daily or weekly quantities as in its judgment the requirements of the market will permit"; that the buyer will "use its best efforts to find a market for the seller's coal so as to enable the seller's collieries to be worked as many days as practicable with due regard to the general market conditions"; and that the buyer "will not discriminate in favor of its own mines, or any persons, firms or companies with which it has contracts to buy coal, but that the quantity to be ordered monthly shall be a just proportion of the entire quantity of coal agreed to be purchased by the buyer, measured by the colliery capacity of the respective sellers, it being understood that so far as practicable the quantity ordered

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shall not be less than a just proportion of all the anthracite coal which the requirements of the market may from time to time demand."

This proves conclusively that the representatives of the subsidiary coal companies did agree upon the form of the contracts before any of them were actually signed. They deny that in their negotiations with the committee of the "individual operators" they represented the defendant carriers. They say they represented only the subsidiary coal companies. Unquestionably, however, the carriers had an interest in the negotiations, and, as they were officers of both the carriers and their subsidiary coal companies, they must be considered as having [492] represented both. The form having been agreed on, the following contracts were entered into:

| Name of seller.                          | Name of buyer.                  | Date of contract. |
|--|---------------------------------|-------------------|
| Green Ridge Coal Co.....                 | Hillside Coal & Iron Co.....    | Nov. 1, 1900      |
| Robertson & Law <sup>a</sup> .....       | do.....                         | Do.               |
| Jermyn et al.....                        | N. Y. Sus. & West. Coal Co..... | Do.               |
| Nay Aug Coal Co.....                     | Hillside Coal & Iron Co.....    | Feb. 1, 1901      |
| Austin Coal Co.....                      | L. V. Coal Co.....              | Mar. 26, 1901     |
| Farrish Coal Co.....                     | L. & W. Coal Co.....            | May 1, 1901       |
| Red Ash Coal Co.....                     | do.....                         | Do.               |
| Melville Coal Co.....                    | do.....                         | June 1, 1901      |
| Midvalley Coal Co.....                   | L. V. Coal Co.....              | June 24, 1901     |
| Lantz & Co.....                          | do.....                         | Do.               |
| Temple Iron Co.....                      | Hillside Coal & Iron Co.....    | July 1, 1901      |
| Howe et al., Executors.....              | L. V. Coal Co.....              | July 9, 1901      |
| St. Clair Coal Co.....                   | P. & R. Coal & Iron Co.....     | July 12, 1901     |
| Enterprise Coal Co.....                  | do.....                         | July 17, 1901     |
| Pine Hill Coal Co.....                   | do.....                         | Aug. 17, 1901     |
| Lackawanna Coal Co.....                  | D. L. & W. R. R. Co.....        | Aug. 27, 1901     |
| Temple Iron Co.....                      | L. V. Coal Co.....              | Sept. 20, 1901    |
| Clear Spring Coal Co.....                | D. L. & W. R. R. Co.....        | Sept. 21, 1901    |
| Richard White et al.....                 | P. & R. Coal & Iron Co.....     | Oct. 15, 1901     |
| Buck Run Coal Co.....                    | do.....                         | Mar. 12, 1902     |
| Ranb Coal Co.....                        | L. V. Coal Co.....              | May 1, 1902       |
| Delaware & Hudson Co. <sup>b</sup> ..... | Hillside Coal & Iron Co.....    | June 30, 1902     |
| Geo. F. Lee Coal Co.....                 | D. L. & W. R. R. Co.....        | Mar. 11, 1903     |
| Clarence Coal Co.....                    | Hillside Coal & Iron Co.....    | Mar. 23, 1903     |
| Lackawanna Coal Co.....                  | do.....                         | Oct. 21, 1903     |
| Dolph Coal Co.....                       | do.....                         | Apr. 14, 1904     |
| Coxe Bros. & Co.....                     | L. V. Coal Co.....              | Mar. 29, 1906     |
| North End Coal Co.....                   | D. L. & W. R. R. Co.....        | May 26, 1906      |

<sup>a</sup> Canceled by mutual consent of parties on May 17, 1909.

<sup>b</sup> Expired April 1, 1908.

These facts seem to show that the custom of buying and selling coal on percentage contracts did not have its origin in any general agreement or concerted action on the part of the defendants. Rather does it seem that the contracts were the natural outgrowth of conditions attending the

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mining of coal. But the petition charges that there are special features in the 65 per cent contracts, and such action concerning their adoption that, as to them at least, there was and is an unlawful combination or conspiracy. The substantial part of the charge is in the following language:

"Upon the termination of these contracts [the contracts which it is alleged were for terms expiring in 1900], the said defendant carriers, either directly or through the instrumentality of their said subsidiary companies and agents, the defendant coal companies, in pursuance of a previous agreement between themselves, severally offered to make and did make and conclude with nearly all the independent operators along their lines new contracts containing substantially uniform provisions agreed upon beforehand by the defendant carriers in concert, some of the operators contracting with one of the defendants and some with another, in which contracts the independent operators severally agreed to deliver, on cars at the breakers, to one or the other of the defendant carriers or its subsidiary coal company, as the case might be, all the anthracite coal thereafter mined from any of their mines now opened and operated or which they might thereafter open and operate, deliveries or shipments to be made from time to time as called for by the said carriers or their subsidiary coal companies; in consideration whereof [493] the said carriers or their subsidiary coal companies severally agreed to pay the independent operators for prepared sizes of anthracite 65 per cent of the general average free on board prices of like sizes prevailing at tide-water points at or near New York, as computed from month to month, and for pea coal and sizes below that proportionately smaller percentages, declining as the sizes decline; and the defendant carriers controlling, as aforesaid, all the lines of transportation between the anthracite regions and tide water, save those of the Pennsylvania Railroad Company and the New York, Ontario & Western Railway Company, and therefore controlling the rates for the transportation of anthracite to tide water except in respect to the output of the limited number of collieries reached by the lines of the said Pennsylvania Railroad Company and the New York, Ontario & Western Railway Company, acting either directly or through the agency of their subsidiary coal companies, fixed the said percentages to be paid by them or their coal companies under said contract at a point that bore such a relation to the published rates of transportation that, taking for a basis the average tide-water prices of anthracite when the contracts were made and during many years previous (barring strike periods), the independent operator who entered into one of these contracts realized upon his coal from 15 to 50 cents more a ton, approximately (depending upon the length of the haul and variations in the tide-water price), than was realized by the independent operator who shipped his coal to tide water on his own account, paying the



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published rates of transportation himself, and sold it there in competition with the coal of the defendant carriers and their coal companies, which difference or advantage represents the amount per ton that the defendant carriers or their coal companies paid for the privilege of controlling the sale and disposition of the independent output so as to prevent it from selling in competition with the output of their own mines, as aforesaid. The result of this arrangement, as was intended, was to draw, if not to force, the great majority of the independent operators into making the aforesaid contracts, thereby enabling the defendant carriers and their subsidiary companies, the defendant coal companies, to control absolutely and until the mines are exhausted the output of most of the independent anthracite mines, and to prevent it, as aforesaid, from being sold in competition with the output of their own mines in the markets of the several states, particularly in the great tide-water markets."

In the brief of the government there are inserted tabulated statements intended to show that after deducting from the amounts received by the Lehigh Valley Coal Company for its coal shipped to New York Harbor between November, 1900, and December 1, 1901, and between January and December, 1907, the 65 per cent paid to the selling companies, the expense of selling, and the loss by wastage, the amounts remaining did not equal the published freight rates of the Lehigh Valley Railroad Company, the owner of its capital stock and over whose road the shipments were made. Other tabulated statements are intended to show the same condition as to coal purchased by the Philadelphia & Reading Coal & Iron Company and shipped over the Philadelphia & Reading Railway Company's line between November, 1900, and December, 1901. Assuming these tabulated statements, prepared under the direction of counsel and not verified by any witness, to be free from error, we fail to find any evidence of concerted action designed to bring about that result. We are dealing here with concerted action, with a contract, combination, or conspiracy, and not with individual unlawful transactions. If it is a fact that the Lehigh Valley Railroad Company is carrying coal for the Lehigh Valley Coal Company at less than its published rates, its conduct is violative of the act to regulate commerce of February 4, 1887, and its amendments, and may be corrected by a proceeding instituted before the Interstate [494] Commerce Commission or some court; but, to be violative of the anti-

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trust act, the discrimination in favor of the Lehigh Valley Coal Company and against other coal companies shipping over the Lehigh Valley road must be the result of a contract, combination, or conspiracy in restraint of interstate commerce. It is not shown that the effect of these contracts was to require each of the defendant carriers to carry coal at less than its published rate. Nor are we satisfied that even in the case of the Lehigh Valley Railroad Company the tabulated statements in the government's brief, above referred to, are free from error. They assume that all the coal shipped to New York Harbor by the Lehigh Valley Coal Company in any particular month was sold during that month. Other possible errors in the statements are pointed out in the brief for the Lehigh Valley Railroad Company.

Nor does it appear that the conferees ever met after the form of the contracts was agreed on. The first three of the contracts, as we have seen, are dated November 1, 1900. No obligation was imposed upon any party to enter into one of them, but each independent operator was left free to do so or not as it might please. Consequently, it may be said, and in effect it is said, that there could have been no combination of carriers, or of their subsidiary coal companies, after November 1, 1900. But in 1907 the total production of anthracite coal in Pennsylvania was 76,836,082 tons. Of this amount 41,963,055 tons were produced by the Delaware, Lackawanna & Western Railroad Company, and the coal companies subsidiary to the Reading Company, the Lehigh Valley Railroad Company, the Central Railroad Company of New Jersey, the Erie Railroad Company, and the New York, Susquehanna & Western Railroad Company, and about 6,000,000 tons were produced by the selling coal companies that had entered into the 65 per cent contracts. By these contracts the buyers (the subsidiary coal companies) were enabled in 1907, to add to the coal produced by themselves that produced and sold under the contracts. Not only have the buyers the right, under these contracts, to all the coal that the sellers' collieries shall ever produce, but they alone are the judges of the requirements of the market, they alone determine when calls for deliveries by the sellers shall be

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made, and they alone determine what shall be the sellers' "just proportion of all the anthracite coal which the requirements of the market may from time to time demand." Here is something more than mere acquisition of property. It is a plan for future acquisition of property and future regulation of the supplies to be furnished by the subsidiary coal companies and the selling companies. It is accordingly contended that the contracts between one of the buyers and its sellers are so related to the contracts between each of the other buyers and its sellers that all the contracts must be considered together as one series of contracts which were entered into and are maintained by a combination of buyers and sellers who thereby restrain interstate commerce and monopolize a part of it. We have seen that the form of the contracts had its origin in a conference of buyers and sellers in October, 1900. But all that the conference did was to agree upon the form, and when that agreement was reached its work was done. Nor is there any evidence showing that the con[495]tracts are maintained by any combination whatever. On their faces, they are contracts between individual buyers and individual sellers. They are not contracts between or with any combination of buyers or sellers. Each buyer has the power to regulate only the supply furnished by its particular sellers. There is no joint power to regulate the supplies furnished by all the sellers. To grant the injunction asked for, namely, "that the said contracts be delivered up to be canceled, and that the defendants, their agents and servants, and all persons acting or assuming to act under their authority, be forever enjoined from further executing or carrying into effect any of the provisions of the said contracts, and from making or entering into any contracts of like character or effect hereafter," means, not that we shall enjoin acts which shall prevent an existing combination from continuing to restrain interstate commerce or to monopolize a part of it, but that we shall severally enjoin the parties who have entered into the 28 independent contracts hereinabove mentioned from operating thereunder. That would be to grant relief on a petition far more multifarious than any one has suggested the present petition to be.

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It presents no such multifariousness. Its purpose is to secure an injunction against these contracts on the ground that they were devised and are maintained by an unlawful combination. We do not find this ground of complaint supported by the evidence.

This conclusion renders it unnecessary to inquire whether the contracts, separately considered, are wholly intrastate contracts, as the defendants contend, or whether, separately considered, they are in restraint of interstate commerce, as the government's counsel contend. In either case, no relief can be granted in this proceeding, for, while the Anti-Trust act condemns all contracts as well as all combinations in restraint of interstate commerce, we are not here asked to award a series of injunctions against defendants who have entered into and are maintaining a series of separate and independent contracts which are in restraint of interstate commerce, but to enjoin an alleged combination from further maintaining a series of alleged unlawful contracts. As no such combination exists, no relief, in respect of the 65 per cent contracts, can be granted.

5. The fifth question is: Do the facts show a general combination or conspiracy in restraint of interstate commerce?

The charge is that, under the influence of competition, the average price of stove coal declined from \$4.15 and \$4.19 a ton in 1892 and 1893 to \$3.60 a ton in 1894 and \$3.12 a ton in 1895. "Whereupon," says the petition—that is, in 1895—"the defendant the Reading Company and the defendant carriers and the defendant coal companies, owning or controlling 90 per cent, more or less, of all the anthracite deposits, and producing 75 per cent, more or less, of the annual anthracite supply, and controlling all the means of transportation between the anthracite mines and tide-water, save the railroads operated by the Pennsylvania Railroad Company and the New York, Ontario & Western Railway Company, which, as aforesaid, reach only a limited number of collieries, entered into an agreement, scheme, combination, or conspiracy, by virtue whereof they acquired the power to con[496]trol, regulate, restrain, and monopolize, and have controlled, regulated, restrained, and monopolized, not

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only the production of anthracite coal, but its transportation from the mines in Pennsylvania to market points in other states, with the result that competition in the transportation and sale of anthracite coal has been wholly suppressed and the price thereof to consumers greatly enhanced." It is further charged that:

"As steps in the development of this illegal combination, and in furtherance of its illegal purposes, the defendants herein named, or some of them, engaged in and became parties to the following additional acts, schemes, and contracts, among others, in violation of the aforesaid act of July 2, 1890."

The additional acts, schemes, and contracts described in the petition are the four combinations already considered and one other, namely, that in the year 1899, after the abandonment of the projected New York, Wyoming & Western Railroad, and after the Pennsylvania Coal Company had caused to be organized, under the laws of the state of New York, the Delaware Valley & Kingston Railroad Company, the Erie Railroad Company, through the agency of the banking house of J. P. Morgan & Co., and in violation of the Anti-Trust Act, acquired nearly all the capital stock of the Pennsylvania Coal Company and the Delaware Valley & Kingston Railroad Company, and thereby defeated the construction of the proposed railroad of the Delaware Valley & Kingston Railroad Company from the Wyoming region to tide water.

I have not separately considered the charge that the Erie Railroad Company's acquisition of the capital stocks of the Pennsylvania Coal Company and the Delaware Valley & Kingston Railroad Company created an unlawful combination for the reason that there is no specific prayer in the petition for relief as to that particular transaction. It seems to have been embodied in the petition merely because it was supposed to have been one of the "steps" in aid of the alleged general combination or conspiracy. Nor have I separately considered the acquisition, in 1905, of the capital stock of Coxe Bros. & Co. by the Lehigh Valley Railroad Company, concerning which much is said in the proofs and the briefs, for the reason that it is not mentioned in the peti-

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tion, and must therefore be considered merely as a part of the proofs relating to the general charge.

What we are asked to do is to find that in 1895 the defendants "entered into an agreement, scheme, combination, or conspiracy" of the broad sweep above mentioned, and that in the development of it they used "as steps" the Erie and Susquehanna combination of 1898, the Temple Iron combination of 1899, the Erie and Pennsylvania Coal Company combination of 1899, the combination formed through the instrumentality of the 65 per cent contracts in 1900, and the Reading and Central combination of 1901. We are also asked to consider the acquisition of the capital stock of Coxe Bros. & Co. by the Lehigh Valley Railroad Company, in 1905, as an element of proof to support the charge of a general combination or conspiracy. But there is no satisfactory proof that these combinations were parts of or steps to a scheme, entered into by the defendants generally, for the control of the anthracite coal business. They were independent combinations, [497] the first of them having been created three years, and the last ten years after it is alleged the general combination or conspiracy was formed. What "contract, combination in the form of trust or otherwise, or conspiracy," for example, existed amongst the defendants generally for the purchase by the Reading Company of the capital stock of the Central? These combinations can not be tied together in one gigantic trust or conspiracy without proof. They have no common board of control, no common scheme of managing their affairs, and no common business interests. Each of them is wholly separate from and independent of the others. I am satisfied that the proofs fail to show the existence of a general combination or conspiracy of the nature set forth in the petition.

Finding no ground, under the petition as it is framed, on which any part of the relief prayed for can be granted, I think a decree should be entered dismissing the petition on the merits as to the first, third, fourth, and fifth combinations above mentioned. As to the second combination, the one known as the Temple Iron combination, I think the petition should be dismissed without prejudice.

## Syllabus.

Per curiam: The result of the foregoing opinions is that the court unanimously agree that the petition should be dismissed: (1) As to the charge in paragraph 7b of the petition concerning the acquisition by the Erie Railroad Company of the capital stock of the New York, Susquehanna & Western Railroad Company; (2) as to the charge in paragraph 7c concerning the acquisition by the Reading Company of the majority of the capital stock of the Central Railroad Company of New Jersey; and (3) as to the general charge of a combination or conspiracy in violation of the anti-trust act of July 2, 1890, in the development of which it is charged the other combinations set forth in the petition were used, as steps, set forth in paragraph 7 of the petition.

A majority of the court hold that the petition should be dismissed as to the charge in paragraph 7a of the petition concerning the so-called 65 per cent contracts.

A majority of the court also hold that the charge of an illegal combination in respect of the matters relating to the Temple Iron Company set forth in paragraph 7d of the petition should be sustained, and that the injunction or restraining order specifically prayed for in the petition should be granted so far as it will serve to prevent and restrain a continuing violation of the act.

Counsel will be heard as to the form of a decree.

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[548] MEEKER v. LEHIGH VALLEY R. CO.\*

(Circuit Court of Appeals, Second Circuit. December 2, 1910.)

[183 Fed. Rep., 548.]

**MONOPOLIES (§ 28)—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE—ACTION FOR DAMAGES.**—A complaint in an action to recover treble damages under Sherman Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), which alleges a combination and conspiracy between defendant and other interstate railroad companies to restrain and monopolize interstate commerce in anthracite coal in violation of sections 1 and 2 of the

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\* For opinion of Circuit Court (162 Fed. Rep. 354) see *ante*, p. 380. See also, 175 Fed. Rep. 320.

## Statement of the Case.

act, which, as alleged, was carried into effect (1) by increasing the price of coal at the mines, through ownership by the conspirators of the coal companies, and (2) by increasing the charge for transportation of coal to New York, so that the two together exceeded the tidewater price, and which contains a sufficient allegation of damage to plaintiff in his business as a coal dealer, states a cause of action under the act which is within the jurisdiction of a Circuit Court, the gist of the action being the unlawful conspiracy, and the fact that one of the means for carrying it into effect was an increase in freight rates, the reasonableness of which per se must first be determined under the provisions [549] of Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 8154), by the Interstate Commerce Commission, not constituting any ground for depriving plaintiff of the right of action expressly given by the Anti-Trust Act.\*

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.]

COURTS (§ 405).—FEDERAL COURTS.—JURISDICTION OF CIRCUIT COURT OF APPEALS.—The question of the jurisdiction of a Circuit Court, when not the sole question determined, is reviewable by the Circuit Court of Appeals under Act March 3, 1891, c. 517, § 6, 26 Stat. 828 (U. S. Comp. St. 1901, p. 549), on a writ of error bringing up the whole case.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097–1103; Dec. Dig. § 405.]

Jurisdiction of Circuit Court of Appeals in general, see notes to *Low Ow Bew v. United States*, 1 C. C. A. 6; *United States Freehold, Land & Em. Co. v. Gallegos*, 32 C. C. A. 475. Review of jurisdiction of Circuit Court, see note to *Hecclstor Wooden-Pipe Co. v. Pacific Bridge Co.*, 48 C. C. A. 351.]

In Error to the Circuit Court of the United States for the Southern District of New York.

Action at law by Henry E. Meeker, as surviving partner, etc., against the Lehigh Valley Railroad Company. Judgment (175 Fed. 320) for defendant, and plaintiff brings error. Reversed.

“Writ of error to review a final judgment of the Circuit Court, Southern District of New York, sustaining a demurrer to, and dismissing, an amended complaint upon the ground that it does not state facts sufficient to constitute a cause of action.

“The action was brought to recover treble damages under the federal anti-trust statute (Act July 2, 1890, c. 647, § 7, 26 Stat. 210 [U. S. Comp. St. 1901, p. 8202]).

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## Statement of the Case.

"The complaint alleges that the plaintiff and his predecessors have been engaged in the city of New York in the business of buying, shipping, and selling anthracite coal; that this coal can be obtained only in a limited area in Pennsylvania; that the greater part of the anthracite coal product is shipped to New York City; that the only means of shipping coal from the anthracite regions to New York is over the lines of the defendant railroad company and certain other railroad companies designated as the 'Anthracite Companies'; that these companies have for many years owned and controlled large tracts of coal lands in said regions and have for many years been engaged, either directly or through the control of coal companies, in mining and dealing in anthracite coal, and control the eastern market for a very large part of such coal annually mined.

"The complaint further alleges that prior to 1901 the plaintiff and other independent shippers were able to, and did, purchase coal in said anthracite regions at varying competitive prices and arranged for its transportation to New York by the various anthracite companies at varying competitive charges, but that in that year said corporations, including the defendant, 'conspired and combined together to increase the prices of anthracite coal at the mines and the charges for the transportation of such coal from the mines in Pennsylvania to New York tidewater to such a point as would enable them to monopolize the trade and commerce in anthracite coal between the said states, and, by driving all independent shippers out of business, to obtain exclusive control of such business and to control absolutely, especially in the New York market, the market price of anthracite coal; and they have ever since maintained such conspiracy and combination.'

"The complaint further alleges that the instrumentality employed to make said company effective was the Temple Iron Company, a mining corporation, [550] all the stock of which was owned by the Anthracite Companies; that the directors of this corporation were officials of the Anthracite Companies; and that these persons, while ostensibly acting as directors, really met and acted for the purpose of considering the most effective means of insuring the success of the conspiracy.

"It further alleges, in substance, that the conspiracy was carried into effect by increasing the price to be paid for coal at the breakers or mines to 65 per cent of the tidewater prices and by charging 40 per cent of the tidewater prices for transportation to New York tidewater. 'This increase in price at the mines,' so the complaint alleges, 'was made so that the independent shippers would not then or at any time subsequently be able to sell anthracite coal in the New York market, in competition with the coal companies owned or controlled by the Anthracite Companies.' And it is also alleged that, while the increased charge for transportation rendered it impossible for the coal companies owned by the Anthracite Companies to make a profit on coal shipped to New York tidewater, yet that this result made no

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difference to the Anthracite Companies as they gained what the coal companies lost.

"The complaint also alleges that, as a result of the conspiracy, the Anthracite Companies have gained almost exclusive control of the New York market for anthracite coal, and, further, contains allegations of damage which are examined in the opinion.

"The original complaint in this action was demurred to, and the demurrer was sustained by Judge Ray in an opinion reported in 162 Fed. 354. Thereupon the plaintiff filed the present amended complaint which is regarded as containing materially different facts from those appearing in the original complaint."

*Shearman and Sterling (John A. Garver and William A. Glasgow, Jr., of counsel)*, for plaintiff in error.

*Alexander and Green (Frank H. Platt, Allan McCulloh, and George S. Franklin, of counsel)*, for defendant in error:

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above):

The complaint sets forth a conspiracy on the part of the defendant and other railroad companies to force independent dealers in anthracite coal out of the field and to obtain control of the market for that product. This conspiracy was carried into effect, it is alleged, (1) by increasing the price paid at the mines, and (2) by increasing the charge for transportation so that the two together exceeded the tide-water price. Obviously independent dealers could not do business when the cost of buying coal and getting it to market was 105 per cent of the market price.

These averments clearly state a violation of the federal anti-trust statute. A conspiracy to monopolize interstate commerce, as well as a conspiracy in constraint of such commerce, is charged. But it does not necessarily follow that every violation of the statute gives rise to a cause of action under its seventh section. The plaintiff must show that he has sustained damage by the violation. And here the defendant contends that the only damages which the plaintiff claims are those arising from unreasonable transportation charges, and that the Interstate Commerce Commission is the tribunal to which resort must be had in the first instance to determine the reasonableness of such charges.

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[551] It is well settled that a shipper seeking reparation based upon the unreasonableness of a freight rate must, primarily, seek redress through the Interstate Commerce Commission. *Texas, etc., R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553. See, also, *Baltimore, etc., R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292, and the opinion of this court in *Wickwire Steel Co. v. New York Central, etc., R. Co.* (decided in June, 1910) 181 Fed. 316.

The difficulty lies in the application of this rule here. The plaintiff is not seeking redress as a shipper. It is not alleged that the defendant carried any coal for him or that he offered any for shipment. The defendant is not sued as a carrier, but as a party to an unlawful conspiracy. The unreasonableness of the railroad rate was only one of the means employed to make the conspiracy effective. The increase of the price at the mines was as essential to that result as the increase in the transportation charge. That the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) creates a tribunal to which shippers must resort, primarily, for relief against excessive freight charges, is no reason why a person injured by an unlawful conspiracy cannot invoke the relief expressly granted by another and later federal statute. It might as well be claimed that the United States cannot proceed against a combination of railroad companies to fix rates until the reasonableness of such rates has been passed upon by the Interstate Commerce Commission. Yet combinations of that nature were enjoined in the *Trans-Missouri Freight Association case*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, and in the *Joint Traffic Association case*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259.

It is true that the courts in determining as one of the elements of a conspiracy case the reasonableness of freight rates might pass upon the same question which would be presented to the Interstate Commerce Commission by a shipper proceeding under the act to regulate commerce. But the possibility of want of uniformity in decisions constitutes no ground for denying to an injured person a right of action granted by a statute of the United States separate and distinct from that act, however weighty such consideration

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might be in determining whether the common-law rights of a shipper and the right to demand damages given by the interstate commerce act itself are subjected to its other provisions. Obviously the same possibility would exist in case of proceedings by the government to enjoin unlawful railroad combinations.

It is also contended by the defendant that, if the object of the conspiracy were to drive the plaintiff and other independent shippers out of the market, the complaint does not allege any damages.

We think, however, that the allegations of damages, although somewhat general, are sufficient to stand the test of demurrer. It is stated that prior to the conspiracy the business of the plaintiff was extensive and profitable, but that since the conspiracy became effective such business has been greatly curtailed and has been conducted either at a loss or at only a small profit. The nature of the injuries is fairly [552] set forth, and the only inference possible from the allegations is that the damages arose as the direct consequence of the conspiracy charged.

The complaint is held to state a cause of action under the federal Anti-Trust statute. It follows that the demurrer was erroneously sustained by the Circuit Court.

But it is contended that this court has no power to reverse the judgment because a jurisdictional question was determined by the Circuit Court, reviewable only by the Supreme Court of the United States. The demurrer, however, was sustained upon the ground that the complaint failed to state a cause of action, not because the court had no jurisdiction. Even if it were necessary to allege in the complaint antecedent action by the Interstate Commerce Commission, the court had jurisdiction of the action. The failure to allege such an essential fact does not deprive a court of jurisdiction. And, even if the question of jurisdiction were before the Circuit Court, it was not the sole question there, and it came with all the other questions in the case for the determination of this court upon the writ of error. *Boston & Maine R. R. Co. v. Gokey*, 210 U. S. 155, 28 Sup. Ct. 657, 52 L. Ed. 1002.

Judgment reversed.

Syllabus.

[704] LOEB v. EASTMAN KODAK CO.

(Circuit Court of Appeals, Third Circuit. November 29, 1910.)

[183 Fed. Rep., 704.]

**MONOPOLIES (§ 28—FEDERAL ANTI-TRUST ACT—ACTION FOR DAMAGES—INJURY TO CORPORATION—RIGHT OF STOCKHOLDERS TO SUE.**—Sherman Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), which provides that "any person who shall be injured in his business or property by any other person or corporation [705] by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any Circuit Court of the United States \* \* \* and shall recover three-fold the damages by him sustained," does not give a right of action to a stockholder or creditor of a corporation by reason of a combination or conspiracy alleged to have been in violation of the act and to have caused the bankruptcy of the corporation resulting in the loss of plaintiff's stock or debt; the right of action in such case being in the corporation or its trustee in bankruptcy.\*

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.]

**PLEADING (§ 339)—WITHDRAWAL OF PLEA TO FILE DEMURRER—DISCRETION OF COURT.**—It is within the discretion of a federal court to permit a defendant to withdraw a plea and file a demurrer on such terms as to costs as it deems just.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1038; Dec. Dig. § 339.]

**PLEADING (§ 236)—AMENDED PLEADINGS—DISCRETION OF COURT.**—Granting or refusing leave to a plaintiff to file an amended statement of claim rests in the sound discretion of the court, and, where the application is to file an amended statement containing different counts as an entirety, the court may properly pass on it as an entirety.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 236.]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Action at law by S. S. Loeb against the Eastman Kodak Company. Judgment for defendant, and plaintiff brings error. Affirmed.

*Joseph A. Langfitt, H. W. McIntosh, and William Kaufman, for plaintiff in error.*

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## Opinion of the Court.

*William M. Robinson and David A. Reed (M. B. Philipp. Walter S. Hubbell, and Reed, Smith, Shaw and Beal, of counsel), for defendant in error.*

Before BUFFINGTON and LANNING, Circuit Judges, and CROSS, District Judge.

CROSS, District Judge.

This action was instituted in the court below to recover treble damages under section 7 of the Sherman anti-trust act, approved July 2, 1890, c. 647, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202). Section 7 is as follows:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

The suit was commenced February 23, 1909, and a statement of claim filed on the same day. The pertinent parts of that claim are as follows:

"The said plaintiff claims damages from the said defendant in the sum of \$45,505.80, upon a cause of action of which the following is a statement:

[706] "At divers and various times and from time to time prior to the year 1902 and in the years 1902, 1903, 1904, and 1905, the defendant company entered into various contracts, combinations in the form of trusts and otherwise, and conspiracies in the restraint of interstate trade and commerce, with American Aristotype Company, Napera Chemical Company, Photo Materials Company, Blair Camera Company, American Camera Manufacturing Company, Kirkland Lithium Paper Company, Rochester Optical Company, Century Camera Company, Rochester Panoramic Camera Company, Seed Dry Plate Company, Standard Dry Plate Company, Stanley Dry Plate Company, and Tapprell & Loomis Company, and divers other persons, firms, and corporations to the plaintiff unknown, and by means of said contracts, combinations, and conspiracies the defendant attempted to monopolize, and did monopolize, the interstate trade and commerce in cameras, films, photographic dry plates, photographic papers, and all other sorts, kinds, and descriptions of photographic supplies. The said contracts, combinations, and conspiracies, and the monopoly

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thereby established, continued throughout and during the years 1902, 1903, 1904, and 1905, and still continue, and the said monopoly has become more complete and stronger from time to time as more and more of said illegal contracts, combinations, and conspiracies have been entered into.

"The Liberty Photo Supply Company was a corporation organized under the laws of the state of Pennsylvania, for the purpose of manufacturing and selling photographic supplies of all descriptions, including all of the articles which the said defendant was monopolizing, and attempting to monopolize as hereinabove set forth. The business of the said Liberty Photo Supply Company had been established by a partnership of the same name which was incorporated in or about June 27, 1902. Its place of business was No. 5907 Baum street, in the city of Pittsburgh, and was continued therein until January, 1906, when it was thrown into involuntary bankruptcy, upon petition filed by the said defendant, the said Rochester Optical Company, and the said Century Camera Company, at No. 3,121 in bankruptcy, in the United States District Court for the Western District of Pennsylvania, upon which petition it was duly adjudged a bankrupt, its property seized upon by a receiver appointed by said court, at the instance of said defendant and its co-petitioners, and sold at prices far below its real value. On distribution of the fund realized in said proceedings, only the costs of administration, state taxes, and about 29 per cent of the wage claims were paid, leaving absolutely nothing for distribution to the balance of wage claims, rent, unsecured creditors and stockholders—all of which, upon reference to said bankruptcy proceedings, will fully and at large appear.

"Plaintiff was a stockholder in said Liberty Photo Supply Company on the date of filing of said petition in bankruptcy to the extent of 162 shares, par value \$50 per share, and said stock was worth the full par value thereof prior to the completion by the defendant of the said illegal monopoly; plaintiff was also an unsecured creditor for moneys loaned and advanced by him to said bankrupt to the amount of \$1,200. Plaintiff had also satisfied out of his own funds the rent claim against said bankrupt, amounting to \$229, taking an assignment thereof from the claimants. Plaintiff had also satisfied out of his own funds the claim of John Nunlist for wages due from said bankrupt amounting to \$81.50 and claim of Carrie Hartz, also for wages, due from said bankrupt, amounting to \$90, and received in distribution on account of the former claim \$15.80 and on account of the latter \$11.71, thus sustaining a loss of \$133.99 on these accounts. And plaintiff has also a claim for wages due to himself from said bankrupt amounting to \$615.36, upon which he received \$109.75, thus losing \$505.61. And plaintiff was also injured and damaged in his personal credit and in divers other ways by reason of the bankruptcy and failure of said Liberty Photo Supply Company, to the amount of \$5,000.

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"Plaintiff further avers that the business of the Liberty Photo Supply Company was totally ruined and destroyed by the defendant, as the direct and immediate result of the illegal monopoly established by defendant in the said articles of interstate trade and commerce by reason of the said illegal contracts, combinations, and conspiracies."

[707] The grievances of the plaintiff summarized were that the defendant, by means of its alleged illegal monopoly, had ruined the business of the Liberty Photo Supply Company, a corporation, in which the plaintiff was a stockholder, whereby the plaintiff suffered the total loss of his shares of stock therein; also, that he had claims against the company which for the same reason were rendered worthless and a total loss, and that he was further injured in his personal credit and in divers other ways "by reason of the bankruptcy and failure of the Liberty Photo Supply Company." Subsequently the defendant filed a plea of not guilty to the plaintiff's statement of claim. Numerous other steps and proceedings in the suit were thereafter had and taken, which it is unnecessary to set forth in detail. It is sufficient to say that the case proceeded so far upon the issues joined therein that an ex parte rule to take depositions had been entered by the plaintiff, and considerable testimony taken thereunder, when on December 10, 1909, the defendant presented a petition to the court in which the action was pending, asking leave to withdraw its plea of not guilty, and to file a demurrer to the statement of claim. The plaintiff demurred to this petition; but the demurrer was overruled, and subsequently, after argument upon the merits of the petition, the court granted its prayer and permitted the defendant to withdraw its plea, and file a demurrer upon terms, however, that the defendant should pay all costs incurred to the date of the order. It should be noted at this point that, before argument was had on the demurrer, the plaintiff on his part applied to the court for permission to file an amended statement of claim of the form then presented, and that argument was heard upon this application at the same time that it was heard upon the demurrer. Subsequently the court denied the application for leave to file the amended statement of claim, sustained the demurrer to the original statement, and entered judgment thereon in favor of the defendant.



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The demurrer was based upon the following grounds:

"First. The statement of claim does not aver with reasonable certainty or definiteness any unlawful or tortious act on the part of the defendant.

"Second. The statement of claim does not show the nature of the alleged conspiracy or combination in restraint of trade.

"Third. The statement of claim shows no causal relation between the alleged unlawful or tortious acts of the defendant and the alleged injury suffered by the plaintiff.

"Fourth. The statement of claim shows that the cause of action, if any, on the allegations of the statement of claim, is in the Liberty Photo Supply Company or its trustee in bankruptcy, and not in the plaintiff.

"Fifth. The plaintiff has no standing, either as a stockholder, director, officer, employee, or creditor of the Liberty Photo Supply Company to maintain this action.

"Sixth. The injuries alleged to have been suffered by the plaintiff as stockholder, director, officer, employee, or creditor of the Liberty Photo Supply Company, or otherwise, are too remote, indirect, consequential, and uncertain to support an action against the defendant.

"Seventh. This action is a collateral attack upon the petition and adjudication in bankruptcy of the Liberty Photo Supply Company and the other proceedings in said action in bankruptcy.

"Eighth. The judgment in the bankruptcy proceedings mentioned in the statement of claim is conclusive against the plaintiff as to the existence of the allegations of the statement of claim and is conclusive against the plain[708]tiff's claim that said petition was filed in pursuance of, or said adjudication in bankruptcy was obtained as a result of, a combination or conspiracy by this defendant.

"Ninth. The alleged wrongful acts of the defendant are presumed to have been set up in defense of said petition in bankruptcy, and that by the adjudication in that action the plaintiff is precluded from asserting them here."

The amended statement of claim which the plaintiff asked leave of the court to file sets forth the same cause of action as the original statement, but in a more precise and amplified form. Among other things, it alleges that there were additional persons, firms, and corporations with which the defendant had combined and conspired, in establishing the illegal monopoly complained of. It also amplified the methods whereby the defendant, in the exercise of its monopoly, injured and destroyed the business of the Liberty Photo Supply Company, and thereby injured the plaintiff. It further alleged that, in the schedules filed by the bankrupt com-

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pany, there was exhibited a claim against the defendant which the trustee in bankruptcy never asserted by suit or otherwise, although requested by the plaintiff so to do; also, that the trustee had filed his final account, been discharged, and the bankruptcy case closed; that the bankrupt had ceased doing business since the date when the petition in bankruptcy was filed against it; and that it had no organization or assets and had never been discharged in bankruptcy. The proposed amended statement of claim also contained a new count setting up other damages alleged to have been directly sustained by the plaintiff through and by means of the illegal acts of the defendant. The gravamen of this count was that the plaintiff had been engaged in the year 1894, and prior thereto, in business as a photographer, and had continued therein to the present time; that in the prosecution of his said business he used large quantities of photographic materials manufactured, sold, and controlled by the defendant; that, by reason of its illegal monopoly therein, it controlled and raised the prices thereof and imposed thereon illegal and unreasonable terms of sale, whereby plaintiff was compelled to pay for such materials large sums of money in excess of the prices which he paid therefor prior to the establishment of said illegal monopoly, whereby, and as a direct result of such monopoly, he was damaged by the defendant to the amount of \$1,000.

The main point in the case, however, is whether the plaintiff can recover for the loss of his stock in the Liberty Photo Supply Company, and of his claim as a creditor of that corporation, under section 7 of the Sherman Anti-Trust Act.

The further point was raised in various forms by the demurrer that the statement of claim did not aver with reasonable certainty any illegal act of the defendant, or show the nature of the alleged conspiracy or combination in restraint of trade, or show any causal relation between the alleged illegal acts of the defendant and the injuries alleged to have been suffered by the plaintiff. In these respects the statement is open to serious criticism, even if it is not fatally defective, and the objections thus made would require careful consideration were it not for the view, unfavorable to the

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plaintiff, that we have taken of the main point, which we shall now proceed to consider.

[709] A right of action is given, by section 7 of the statute above referred to, to "any person who shall be injured in his business or property, by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act." By a subsequent section the word "person" is declared to include a corporation. Admittedly the words of the statute are comprehensive. Prior to the statute, however, a stockholder in a corporation would have been without direct relief for an injury to his stock, through a wrong done to the corporation. The remedy for such an injury resided in the first instance, solely in the corporation. By means of such a suit it could have enforced the rights and redressed the wrongs of each of its stockholders. The statute above referred to was passed, as we must assume, with full knowledge of existing law in that respect. We have no reason to suppose, much less to assume, that it was intended thereby to run contrary to the settled policy of the law. Such an assumption would require us to believe that the act was intended, among other things, to multiply suits. Certainly it is not apparent that the act was intended to or did confer upon hundreds or thousands of stockholders individual rights of action when their wrongs could have been equally well and far more economically redressed by a single suit in the name of the corporation. Moreover, it is manifest that the plaintiff did not receive any direct injury from the alleged illegal acts of the defendant. No conspiracy or combination against him as a stockholder or creditor is alleged. The injury complained of was directed at the corporation, and not the individual stockholder. Hence any injury which he, as a stockholder, received was indirect, remote, and consequential. If a stockholder could successfully maintain such a suit, why not any creditor of the corporation? A creditor would apparently be injured in the same way and to the same extent as a stockholder, assuming that their interests were equal. Indeed, the claim demurred to assumes that both are equally injured, since the plaintiff sued not only for damages for alleged injuries to his rights as a stockholder, but also as a creditor of the Liberty Photo Supply Company.

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There must exist some barrier which will effectually prevent such a multiplicity of suits as the plaintiff's position suggests, and we believe not only that that barrier exists, but that it is found now just where it was prior to the passage of the act in question. To illustrate, before bankruptcy a right of action, of the character in question, resided, as we have said, in the corporation, and subsequent to bankruptcy we think it equally clear that it resided in the trustee. It was suggested, however, on behalf of the plaintiff, that a trustee in bankruptcy could not institute such an action, nor could a suit in equity be maintained under the Sherman Act. The answer is obvious even if we assume that a suit of the suggested character could not be maintained in equity. The stockholder could certainly apply to the court to have the trustee instructed to bring the action, and the court could require it to be brought, or it could permit the stockholder to sue in the name of the trustee upon indemnifying the estate against the costs of the suit. Moreover, it appears that the plaintiff herein evidently thought that the trustee could maintain the action, for in his proposed [710] amended statement of claim he alleges that he requested the trustee to bring such a suit. We think the statement of claim demurred to is bad, in that it did not, under the circumstances, set forth a cause of action in the plaintiff. This view is in accordance with that taken by Judge Brown, in *Ames v. American Telephone & Telegraph Company* (C. C.) 166 Fed. 820, which likewise arose upon demurrer. The principles laid down in that case are sound, and the clear and able reasoning of Judge Brown is well supported by the authorities cited, to which others might be added upon some of the points, were it necessary.

It is claimed, however, that the Circuit Court erred in allowing the defendant to withdraw its plea and file a demurrer, likewise in denying the plaintiff's application to rescind such permission after it had been granted. This was a matter which rested entirely in the sound discretion of the court, and under the circumstances of the case we think that it was not only permissible, but proper, to grant such leave. When the plaintiff's statement of claim was first brought to the attention of the court, if it appeared that

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the plaintiff had misconceived his rights, and that he had no cause of action, it would seem that the interests of the parties and the speedy administration of justice were alike furthered by permitting the question to be raised and decided at once, thereby saving costs and expense to the parties. The action of the learned judge in the premises should be commended rather than censured. Had the case been permitted to go to trial, the same result would, in our judgment, have ultimately been attained.

In *Baltimore & O. R. Co. v. Camp*, 81 Fed. 807, 26 C. C. A. 626, and *Deakins v. Lee*, Fed. Cas. No. 3,697, answers were permitted to be withdrawn and demurrers filed, and in *Eberle v. Moore et al.*, 65 U. S. 147, 16 L. Ed. 612, the court below was sustained in granting permission to the defendant to withdraw a plea in bar and file a plea in abatement. In *Spencer v. Lapsley*, 20 How. 264, 15 L. Ed. 902, the Circuit Court, on the other hand, had denied an application by a defendant to withdraw his plea in bar and file a plea in abatement. The Supreme Court upheld the ruling below and said:

"This court has decided that such applications are addressed to the judicial discretion of the inferior court, and its decision is not open for revision here. It has decided that the refusal of an inferior court to allow a plea to be amended, or a new plea to be filed, or to grant a new trial or a continuance, or to reinstate a cause which has been legally dismissed, cannot be questioned for error in this court. *Marine Ins. Co. of Alexandria v. Hodgson*, 6 Cranch, 206 [3 L. Ed. 200]; *Stums v. Hundley*, 6 How. 1 [12 L. Ed. 319]."

The only remaining assignment of error which requires consideration alleges that the Circuit Court erred in refusing the motion to amend the plaintiff's statement of claim and in sustaining the demurrer. This assignment is not strictly in form, since it alleges two distinct and independent grounds of error, but, waiving that, we proceed to consider the only question not already considered as to whether the court erred in refusing permission to the plaintiff to amend its statement of claim. We think it did not. The propriety of allowing the amendment in this instance also rested in the sound discretion of the [711] court, and, in the form in which the application was presented, the judge could not have done otherwise than he did. The proposed statement of

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claim contained two counts, one of which merely restated in a more amplified and specific form the matters contained in the original claim. Such modifications as were made therein did not cure the vice of the original statement, since, as amended, it did not set forth a valid cause of action in the plaintiff. The amended statement, so far as the count of which we are speaking is concerned, would have been as open to demurrer as the original. It is true that the amended statement proposed to insert a new count of the character hereinabove indicated; but no application was made to the court for leave to file this count by itself, so that the court was not obliged to pass upon its sufficiency. The application was made to file both counts as an entirety, and the application could properly be refused or granted as an entirety.

Furthermore, it should be noted that the amplified and amended original count related to indirect and consequential injuries alleged to have been sustained by the plaintiff as a stockholder through the illegal combinations and conspiracies of the defendant, while the new or additional count pertained to certain direct injuries alleged to have been sustained by the plaintiff in his own business; hence it was intended to, and did, set up a new and independent cause of action. Furthermore, the refusal of the judge to allow its introduction into the statement of claim did not substantially injure the plaintiff, since there was nothing, after the demurrer was sustained, to prevent the plaintiff from instituting a new action upon the injury alleged to have been directly sustained by him in his own business. Under the circumstances, the court did not abuse its discretion.

Upon the whole case, we think the judgment below was right, and that it should be affirmed, with costs.

